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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11669

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WALTER KORPAN,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

STATEMENT IN ACCORDANCE WITH RULE 10(b)
OF THE RULES OF THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1. The action was instituted by the filing of an Indictment on September 2, 1955.

2. The original and present parties are the United States of America, plaintiff-appellee, and Walter Korpan, defendant-appellant.

3. On September 2, 1955, the date of the filing of the Indictment, the District Court ordered the issuance of a bench warrant and fixing bond at \$1,000.00. On September 8, 1955 defendant and his attorney filed their appearances and on that date defendant, Walter Korpan, filed his appearance bond. On October 17, 1955 defendant entered his plea of not guilty.

4. A trial was had on October 25, 1955 before the Honorable John P. Barnes, Chief Judge of the United States District Court, Northern District of Illinois, Eastern Division; on that day defendant had filed a waiver of jury.

5. On December 5, 1955 the Honorable John P. Barnes entered an order denying defendant's motions for a judgment of acquittal, finding defendant guilty as charged, ordering defendant fined \$750.00 plus costs, and staying execution three days.

6. On December 8, 1955 the Honorable John P. Barnes entered an order overruling defendant's motions for new trial and in arrest of judgment, granting defendant's motion for enlargement on bail pending appeal, and fixing bail on appeal at \$1,000.00, one bond to cover both of the foregoing.

7. Notice of appeal was filed by defendant on December 15, 1955.

Simon Herr

Simon Herr

105 West Monroe Street

Chicago 3, Illinois

Crowley, Sprecher and Weeks

Crowley, Sprecher and Weeks

100 West Monroe Street

Chicago 3, Illinois

Attorneys for Defendant-Appellant

Service of copy of the foregoing Statement is acknowledged this day of January, 1956.

 Attorney for Plaintiff-Appellee

3 PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of December (it being the 5th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Five and of the Independence of the United States of America, the 180th Year.

Present: Honorable John P. Barnes, Chief District Judge
 Honorable William H. Holly, District Judge
 Honorable Philip L. Sullivan, District Judge
 Honorable Michael L. Igoe, District Judge
 Honorable William J. Campbell, District Judge
 Honorable Walter J. La Buy, District Judge
 Honorable J. Sam Perry, District Judge
 Honorable Win G. Knoch, District Judge
 Honorable Julius J. Hoffman, District Judge

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Monday, December 5, 1955

Court met pursuant to adjournment

Present: Honorable John P. Barnes, Trial Judge

Thursday, December 8, 1955

Court met pursuant to adjournment

Present: Honorable John P. Barnes, Trial Judge

4

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 55 CR 486) • •

Be It Remembered, that on to wit, the 2nd day of September, 1955, the above-entitled action was commenced by the filing of the Indictment in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to wit:

5

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 55 CR 486) • •

The August 1955 Grand Jury charges:

That during the month of August, 1955,

WALTER KORPAN,

defendant herein, did occupy the premises known as Korpan's Landing at 110 East Lakeview, Fox Lake, Illinois, in the Northern District of Illinois, Eastern Division; and did maintain for use and permitted the use on said premises of certain coin operated gaming devices as defined in Section 4462(a)(2), Title 26, United States Code, by reason of which facts the said Walter Korpan was a person obligated to pay the special occupational tax on coin operated gaming devices imposed by Section 4461(2), Title 26, United States Code; and that well knowing the foregoing facts the said Walter Korpan did wilfully and unlawfully fail to pay the special occupational tax on coin operated gaming devices.

In violation of Section 7203, Title 26, United States Code.

A True Bill

John C. McClure

Foreman

R. Tieken

United States Attorney

6 And afterwards on, to wit, the 8th day of September, 1955 came the Defendant by his attorneys filed in the Clerk's office of said Court his certain Appearance in words and figures following, to wit:

7

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 55 CR 486) • •

I enter my appearance as attorney for Walter Korpan, defendant in the above-entitled case.

Dated 9-8-1955

Simon Herr

Address: 1104—111 W. Monroe St.
Chicago 2, Ill.

4

Waiver of Trial by Jury

8

And afterwards, to wit, on the 17th day of October, 1955, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

9

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 55 CR 486) • •

This day comes the United States by the United States Attorney comes also the defendant Walter Korpan in his own proper person and by his counsel and being arraigned upon the Indictment filed herein against him pleads not guilty thereto and it is

Ordered that this cause be and the same hereby is set for trial on October 25, 1955 at 10 a.m.

10

And afterwards on, to wit, the 25th day of October, 1955 there was filed in the Clerk's office of said Court a certain Waiver Of Trial By Jury in words and figures following, to wit:

11

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 55 CR 486) • •

WAIVER OF TRIAL BY JURY

Comes Walter Korpan, defendant in the above entitled cause in his own proper person and by Simon Herr, his attorney, and the defendant, having been advised in open court by the court of his right to a trial by jury, hereby waives that right and consents to a trial by the court without a jury.

Walter Korpan
Defendant

Simon Herr
Attorney for Defendant.

Robert Tieken, United States Attorney for the Northern District of Illinois, hereby consents to the waiver by the defendant above-named of a trial by jury of the above-entitled cause.

Robert Tieken, United States Atty.
By Wm. A. Barnett
Assistant United States Atty.

Approved:

John P. Barnes
United States District Judge

12 And afterwards on, to wit, the 9th day of November, 1955 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On October 25, 1955, Before The Honorable John P. Barnes, Chief Judge, in words and figures following, to wit:

14

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 55 CR 486) • •

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, Chief Judge of said Court, in his court room in the United States Court House at Chicago, Illinois; commencing on Tuesday, October 25, 1955, at 10:00 o'clock a.m.

Appearances:

Hon. Robert Tieken, United States District Attorney, by
William A. Barnett, Esq., Assistant United States District Attorney,
on behalf of the Government;

Simon Herr, Esq.,
on behalf of the Defendant.

15 By Mr. Herr: The jury is waived if the Court will permit it.

By The Court: Yes. I understand you are agreeable?

By Mr. Barnett: We have no objection, your Honor.

By The Court: Sign the jury waiver.

By Mr. Herr: (Addressing the defendant) You sign right here.

By The Court: Proceed, gentlemen.

And Thereupon Mr. Barnett Addressed The Court
In Opening Statement On Behalf Of The Government.

By Mr. Barnett: Your Honor, the defendant in this case, Walter Korpan, is charged in the indictment with having occupied premises in Fox Lake, Illinois, and having maintained on such premises certain coin-operated devices which were gaming devices, and this is under 42-62A2, U. S. Code, Title 26.

He is further charged that he was aware he was operating such gaming devices, that he knew he was obligated under the Internal Revenue Code to pay a special occupational tax on such gaming devices.

15½ By The Court: Wait a minute.

Mr. Korpan, will you step forward, please.

You have been advised, or if you have not been you are now advised you are entitled to a trial by twelve men and women in that jury box. You know that?

By The Defendant Korpan: Yes, sir.

By The Court: You said you are willing to waive that and be tried by the court?

By The Defendant Korpan: Yes.

By The Court: You understand there will be no jury in this case, is that right?

By The Defendant Korpan: Yes.

By The Court: Is that what you want?

By The Defendant Korpan: Yes.

By The Court: Very well.

Proceed, gentlemen.

By Mr. Barnett: It is charged in the indictment the defendant Walter Korpan occupied and maintained for use on his premises certain coin-operated gaming devices, that he knew he was subject to the payment of special occupational tax, and notwithstanding he knew that he wilfully and unlawfully failed to pay that tax on the gaming devices.

16 We will produce evidence that he failed to make such payment, and he was advised by special agents of the Internal Revenue Service of the necessity for making such payment; that he admitted to the special agents that he made pay-outs on the machine.

He has denied that he made those pay-outs. He thereafter purchased a music or amusement stamp tax or, I should say, tax stamp, for the fiscal year 1956, beginning on July 1, 1955.

The testimony will show that thereafter he did make pay-outs in his establishment, at least on August 12, 1955; that he admitted on that night after the agents had identified themselves to him that he knew he shouldn't have made those pay-outs without a gaming stamp.

The evidence will also show he has had these machines in his establishment for some time. The machines are not owned by him but are owned by another. Collections are made and allowances are made out of the collected sums for amounts that have been paid out by him to the winning players. Amounts paid out to the winning players are computed by a computing device, a device in the machine, and we will have those machines here.

These are the bingo type machines and the machines will be demonstrated in the court, and it is the Government's contention these machines fall within the meaning of the statute requiring that a person who maintains such machines on the premises occupied by him and makes pay-outs on such machines is subject to the payment of the Federal stamp tax on the gaming devices.

Mrs. Vollner, will you please take the stand?

By The Court: Does the defendant care to make a statement?

By Mr. Herr: I would like to.

By The Court: Very well.

And Thereupon Mr. Herr Addressed The Court In Opening Statement On Behalf Of The Defendant.

By Mr. Herr: The defense, your Honor, is that these pin ball machines provide for pay-outs upon the result obtained by the player.

The game involves a degree of skill, it is not a slot machine, that sometimes the owners will if the players wish to redeem the plays they are entitled to, by virtue of having accomplished a certain result; that it has not been the legislative intent to tax these machines at the rate of \$250.00 per year, but rather at the rate of \$10.00 a year; that the legislative purpose and intent has clearly been expressed by the Committees in their reports to Congress, both by the House of Representatives and by the Senate; and that they specifically distinguish between this type of machine and the usual or commonly known slot machine, and sometimes referred to in the committees of Congress as "one-arm-bandits."

These machines were distinguished by the committees and in their reports they made a distinction.

Over the years from 1941 up to I believe 1953 enforcement of those "use" tax regulations, the Department has regularly and consistently viewed them as subject to a \$10.00 tax or \$25.00 tax, depending on what tax was passed that year as fixed by Congress.

18 In 1953 a change occurred in the interpretation by the Department of that Act, and from that time forward they have insisted if the owner redeems the games and pays out for them, rather than have the player playing out as he is permitted to do by virtue of his having won the right to do so, then the owner of the machine they say should pay \$250.00.

That is not by virtue of what the Legislature has done, but by virtue of what the Department has established, contrary to its established practice over a period from 1941 to I think 1953. It may have been 1952, I am not sure.

Now, then, there have been several cases instituted in the United States to reach the issue. One is pending in New Orleans and is a civil action.

Another is pending in still another suit where the Government is contending certain machines require that stamp.

Neither of those has been disposed of. The question now is virtually new, as it is submitted to your Honor.

I would like to point out to the Court here that these are games which require a certain degree of skill; how much

I don't know. I have not played them.

19 Your Honor has so held and your Honor has been affirmed on that case of Chicago Paint Corporation *vs.* Jenko, which you may recall.

There are other cases I have supporting that, and also a substantial amount of record and transcript of the Congressional Committees and of Congress with respect to this legislation.

Its intent clearly and unequivocally expressed is there. If your Honor will permit me I would like to read for one moment—

By The Court: First let's get the facts in before we go into that.

By Mr. Barnett: May I proceed, your Honor?

By The Court: Yes.

By Mr. Barnett: Mrs. Vollner, will you take the stand, please.

20 Thereupon The Government, To Maintain The Issues On Its Part, Introduced The Following Evidence, To Wit:

CLARA K. VOLLNER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Barnett:

Q. Will you state your name, please?

A. My name is Clara K. Vollner.

By The Court: Speak louder. What is your last name?

By The Witness: My name is Clara K. Vollner.

By Mr. Barnett:

Q. Where do you live?

A. 1645 North Monticello Avenue.

By The Court: Is that V-o-l-l-n-e-r?

By The Witness: Yes, Vollner. I live at 1645 North Monticello Avenue.

By Mr. Barnett:

Q. In Chicago?

A. In Chicago, Illinois.

20½ Q. What is your occupation, Mrs. Vollner?

A. Tax technician, miscellaneous tax technician.

Q. In what office?

A. In the office of the District Director of Internal Revenue, First District of Illinois.

Q. Does that office receive returns that are filed from Lake County, Illinois?

A. It does.

Q. Is that the designated office in which such returns are supposed to be filed?

A. That is true.

Q. As a miscellaneous tax technician do your duties include working on special occupational taxes on coin-operated amusement devices and coin-operated gaming devices?

A. It does.

Q. Are you in fact more or less in charge of that section in your office?

A. To a certain extent.

Q. I see. Now, when returns are filed and payment is made for a special occupational tax on either amusement or gaming devices, coin-operated that is, are they filed in your office?

A. They are filed—

21 Q. After payment is made and return is filed are they then under your general supervision?

A. They are under my general supervision.

Q. Is it the custom of the office to keep such returns?

A. It is.

Q. They are part of the records of the office?

A. Yes.

Q. Have you made a search of the files under your general supervision for amusement tax returns or gaming tax returns and payment made therewith of one Walter Korpan of Fox Lake, Illinois?

A. I have.

Q. Did you find any such document filed by Walter Korpan?

A. Yes, I did.

Q. Do you have those documents with you?

A. I do.

Q. May I see them, please?

A. Yes.

(Witness handed document to Mr. Barnett.)

By Mr. Barnett: Will the Reporter please mark these documents Government's Exhibits 1 and 2 for identification?

22 (Thereupon said documents were marked Government's Exhibits 1 and 2 for identification.)

By Mr. Barnett:

Q. I hand you, Mrs. Vollner, Government's Exhibit 1 for identification, which purports to be a special tax return by Walter Korpan for amusement coin-operated amusement devices and ask you if this is the document which was on file in your office as part of the records of your office?

A. It is.

By Mr. Barnett: Your Honor, I offer Government's Exhibit 1 for identification in evidence as Government's Exhibit 1.

By Mr. Herr: No objection.

By The Court: It may be received.

(Said document, so offered and received in evidence, was marked Government's Exhibit 1.)

By Mr. Barnett:

Q. Will you tell us how many devices are shown in that return to have been paid for.

A. Five.

Q. Five coin-operated devices?

23 A. Yes, sir.

Q. For amusement purposes only?

A. It so states.

Q. How much is the amount of the tax for the five devices?

A. \$10.00 each or \$50.00 for the five for one year.

Q. For what year is that filed?

A. July 1, 1955 through June 30, 1956.

Q. What was the date on which it was filed?

A. June 22, 1955.

Q. And does it show payment was received with the return?

A. Yes, it does.

Q. Mrs. Vollner, I now hand you Government's Exhibit 2 for identification which purports to be a return filed by Walter Korpan for gaming devices, and ask you if it is a document taken from the records of your office?

A. It is.

By Mr. Barnett: I offer in evidence, your Honor, Government's Exhibit 2 for identification as Government's Exhibit 2.

By Mr. Herr: No objection.

24 By The Court: It may be received.

(Said document, so offered and received in evidence, was marked Government's Exhibit 2.)

By Mr. Barnett:

Q. Will you examine Government's Exhibit 2, Mrs. Vollner, and tell us the date on which it was filed?

A. It was received in the District Office on December 21, 1955.

Q. And what is it for, how many devices?

A. For three gaming pin ball devices.

Q. How much is the amount of tax paid?

A. \$750.00.

Q. At the rate of how much each?

A. \$250.00 for each device.

Q. Where does it say on the return the machines are located?

A. At Korpan's Landing in Fox Lake, Illinois.

Q. Were you able to find any files of your office, any record of any payment of tax on gaming devices filed or paid by Mr. Korpan for the Government's fiscal year 1956 on any date prior to September 21, 1955?

A. I was not able to find anything else.

25 By Mr. Barnett: You may cross examine.

Cross Examination

By Mr. Herr:

Q. Mrs. Vollner, how long have you been in that office?

A. I have been in that position for twelve years.

Q. And are you acquainted with the form and applications used in connection with making application for tax receipts?

A. I am.

Q. I want to show you a form that now bears at the bottom the mark of Exhibit 7 as a number, and which I will ask that it be permitted to retain that number, because it is part of the exhibits I propose to offer, and has that number on it.

By The Court: Very well.

By Mr. Herr:

Q. (Continuing) Do you recall ever having seen in your department an application on that form?

A. We do. It is a form we used for many years up to about two years ago.

Q. Two years ago that was changed?

26 A. That's right.

Q. The specific change made two years ago for the form prior to two years ago did read, "Coin-operated amusement device (pin ball or all other amusement machines)" \$10.00 per machine was changed as per Exhibit 8 to read, "Coin-operated amusement devices (any amusement or music machines)".

In other words, the words "pin ball" were removed from the application in 1952?

A. That's right.

Q. Since then on pin ball machines where plays are redeemed you require \$250.00?

A. That's right.

Q. Do you know how that change came about?

A. It was changed by law, I am quite sure, by procedure in the office at Washington.

Q. Someone in your department established that as a new regulation, is that right?

A. In the Internal Revenue Service.

By Mr. Herr: There is no other question, your Honor.

By Mr. Barnett: You may step down.

(Witness excused.)

27 By Mr. Barnett: Mr. Lonchar, will you take the stand?

By Mr. Herr: Your Honor, what I have shown this first witness was what is marked as Defendant's Exhibits 7 and 8.

By Mr. Barnett: You are not offering them at this time?

By Mr. Herr: I can't.

By Mr. Barnett: Do we have a copy?

By Mr. Herr: I think I supplied you with a copy of each one of those.

By Mr. Barnett: Mr. Lonchar, will you take the stand now.

DONALD M. LONCHAR, JR., called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barnett:

Q. Will you state your full name, please?

A. Donald M. Lonchar, Jr.

Q. Where do you live, Mr. Lonchar?

28 A. I live at 1739 Dickenson in the City of Waukegan, Illinois.

Q. What is your occupation?

A. I am a special agent with the Intelligence Division of the Internal Revenue Service.

Q. How long have you held that position?

A. I have been in the Internal Revenue Service for about five and one-half years and a special agent for approximately two years.

Q. And how long have you been in Waukegan as a special agent?

A. About four and one-half months.

Q. Are you in charge of the office in Waukegan?

A. Yes, sir, I am.

Q. What educational qualifications do you have for your job, Mr. Lonchar?

A. I am a graduate of Northwestern University with a major in accounting, and I have a Juris Doctor degree from DePaul University and I have recently passed the Illinois Bar examination.

Q. What are your duties as a special agent in charge of the Waukegan office?

A. My general duties are the enforcement of the Internal Revenue laws in the counties of Lake and McHenry, Illinois.

29 Q. That includes enforcement of regulations promulgated under the Internal Revenue laws?

A. Yes, it does.

Q. Does the enforcement of special occupational taxes on coin-operated amusement devices and coin-operated gaming devices fall within the purview of your duties?

A. Yes, sir, it does.

Q. During the calendar year of 1956 did you have occasion to make an investigation into the matter of special occupational taxes on gaming devices? I mean in the Waukegan area and in Lake County particularly.

A. Yes, sir.

Q. When was that in 1956?

A. The investigation was conducted initially on June 15, 16 and 17.

Q. I see. Now, during the course of this investigation did you have occasion to visit a place called Korpan's Landing in Fox Lake, Illinois?

A. Yes, sir.

Q. Did you there meet the defendant Walter Korpan?

30 A. Yes, sir.

Q. Do you see him in the court room now?

A. Yes, sir, I do.

Q. Can you point him out, please?

A. The gentleman sitting over there in the blue suit. By Mr. Barnett: May the record show the gentleman has identified the defendant.

By The Court: Yes.

By Mr. Barnett:

Q. Give us the date on which you went to Korpan's Landing and called on Mr. Korpan?

A. I called on Mr. Korpan Thursday, June 16, 1955.

Q. Was there anybody with you at that time?

A. Yes, I was accompanied by a collection officer from the Waukegan office.

Q. What was his name?

A. Frank Evangelista.

Q. Was there anybody on the premises at Walter Korpan's establishment at that time?

A. There were a couple of customers when we entered the establishment.

Q. Did you have a conversation with the defendant?

31 A. Yes, I did.

Q. Will you please state what he said to you and what you said to him at that time and place?

A. Well, both Mr. Evangelista and myself identified ourselves as Internal Revenue employees or particularly special agent and collection officer, and asked Mr. Korpan to exhibit his special stamp tax covering the coin-operated devices on his premises for the then current fiscal year ending June 30, 1955.

Mr. Korpan produced the same, which covered the machines on his premises. I then asked Mr. Korpan if, relative to the coin-operated devices, he paid off winners on these machines in either cash, merchandise, premiums or tokens, and he denied the same.

I then spent some time in explaining to Mr. Korpan that under the Internal Revenue laws relative to the taxes on these machines he would be liable to a \$250.00 special tax stamp per machine if it was employed as a gaming device.

He indicated to me that he understood, and I further explained to him that in the event the Federal Government had evidence that he had paid off in cash or its
32 equivalent persons winning on these machines he might be subject to both civil and criminal penalties, and he indicated that he understood this.

Essentially that was the conversation that we had.

Q. Did you notice any coin-operated devices on the premises?

A. Yes, I did.

Q. Will you tell us what the nature of those devices were, and describe them for us?

A. As I faced Mr. Korpan he was across from me and behind the bar in his establishment there were behind me three machines known as bingo machines.

He also had on the premises a shuffle alley type machine and a juke box or music machine.

By The Court: Or what?

By The Witness: Music machine.

By Mr. Barnett:

Q. You say that you asked him for the stamp. Did he exhibit the same to you?

A. I believe he did.

Q. For what year was that stamp?

33 A. For the year ending June 30, 1955.

Q. For the year ending June 30, 1955?

A. At that time he was not—at that moment he was not liable for a tax for the present fiscal year.

Q. Which begins when?

A. Which begins July 1, 1955 and ends June 30, 1956.

Q. Did you tell him on what date he would become liable for the next fiscal year tax?

A. Yes, I explained to him this call was being made in advance of the new filing period which would commence July 1st relative to gaming devices, and if on July 1st he had such gaming devices in operation on his premises he should file special tax stamp returns and pay \$250.00 per each gaming device.

Q. Will you describe in more detail the three machines you call bingo machines?

A. These machines are quite common in the Lake County area and they constitute a device which is operated by means of actuating certain devices in the machine by means of the insertion of a coin, principally dimes,
34 and also by actuating a spring type plunger which propels five balls about a board upon which there are electrical contacts and wiring, and small holes into which the balls may drop and become permanently lodged there for the duration of the game.

Q. Is it your opinion under Code and the regulations of the Internal Revenue laws a gaming tax applies to that type of machine?

By Mr. Herr: That is objected to, your Honor.

By The Court: Sustained.

By Mr. Barnett:

Q. Do you enforce the law applying the gaming tax against machines of that type when they are used for making pay-outs to winning players?

A. Yes, sir.

By Mr. Barnett: We have some machines out in the hall, your Honor, which I would like to have brought into the court room.

By The Court: Very well.

By Mr. Barnett: It may take a few minutes.

By The Court: We will take a short recess.

35 (Whereupon a short recess was taken.)

By Mr. Barnett: Will the Reporter please mark these machines?

(Thereupon said machines were marked Government's Exhibits 3, 4 and 5 for identification.)

By Mr. Barnett:

Q. Mr. Lonchar, before the recess you described for us three machines which you called bingo machines which were on the premises at Korpan's Landing on June 16, 1955. Will you step down, please, and examine Government's Exhibits for identification 3, 4 and 5 and tell us whether that is the type of machine which you were describing, those three machines.

(The witness left the witness stand and stood in front of the machines in question, Government's Exhibits 3, 4 and 5 for identification.)

By The Witness:

A. Yes, sir.

By Mr. Barnett: You may cross examine.

36 By Mr. Herr: I have no examination of this witness, your Honor.

By The Court: Very well.

By Mr. Barnett: You may step down, Mr. Lonchar.

(Witness excused.)

By Mr. Barnett: Mrs. Veit, will you take the stand, please?

ANNETTE L. VEIT, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barnett:

Q. Will you state your full name, please?

A. Annette L. Veit.

By The Court: I can't hear you.

By The Witness: My name is Annette L. Veit.

By The Court: How do you spell your name?

By the Witness: V-e-i-t.

By Mr. Barnett:

Q. Is that Miss or Mrs.?

37 A. Mrs.

Q. Where do you live, Mrs. Veit?

A. 313 East Whitehall in Northlake, Illinois.

Q. Are you employed?

A. Yes, I am.

Q. Where are you employed?

A. Chicago North Western Railroad out in Proviso.

Q. What position do you hold there?

A. I am a clerk in the Agent's office.

Q. I see. Have you vacationed at a place called Korpan's Landing in Fox Lake, Illinois?

A. Yes, I have.

Q. During the summer of 1955?

A. Yes, sir.

Q. Will you tell us what dates you were there?

A. I was there from July 30th until August 13.

Q. Of 1955?

A. Of 1955.

Q. What type establishment is that?

A. It is a very nice place. It has cottages; I mean year-round homes, not really cottages. There is a hotel, an establishment which consists of a small restaurant, hamburgers and such, but not dinners; there is a bar and a
38 place you can come in and take your children and sit in the evening or come in by yourself if you like. It is an eating place.

Q. There are several cottages rented out?

A. Yes.

Q. And a main building?

A. I would call it a tavern and restaurant, a main building. Everybody comes in all day long.

Q. The entire place is called Korpan's Landing?

A. Yes.

Q. You say you vacationed up there during the time from July 30th until August 13, 1955?

A. Yes, sir.

Q. Do you know the defendant here, Walter Korpan?

A. Yes, sir, I do.

Q. Do you see him in the court room?

A. Yes, sir, he is sitting behind the machines there.

By Mr. Barnett: Let the record show the witness has identified the defendant.

By The Court: Yes.

39 By Mr. Barnett:

Q. Directing your attention to the evening of August 12, 1955 were you in the tavern of Korpan's Landing?

A. Yes, sir, I was.

Q. Did you see on display in the tavern such machines as Government's Exhibits 3, 4 and 5 for identification, which are here in front of you?

A. Yes, sir, I did.

Q. Did you play any of those machines?

A. Yes, sir, I did.

Q. Did you win any free games on those machines?

A. Yes, sir.

Q. How many free games did you win?

A. Twenty-one.

Q. You won twenty-one free games?

A. Altogether, yes, sir.

Q. Did you play off any of those free games?

A. Yes, sir, I did.

Q. Did you receive reimbursement in cash for any of the free games yourself?

A. Yes, sir, I did.

Q. How many?

A. Ten.

40 Q. How much did you receive?

A. One dollar.

Q. From whom did you receive it?

A. Mr. Korpan.

Q. During that evening did you see on the premises special agents Shannon and Kelly, if you know them by name?

A. Yes, sir, I did, but I didn't know it at the time.

By Mr. Barnett: You may cross examine.

Cross Examination

By Mr. Herr:

Q. Do you know what a slot machine is?

A. Yes, sir.

Q. A slot machine as you know it has cylinders that rotate after you pull a lever, is that right?

A. Yes, sir.

Q. You have nothing to do with the play of that machine? Is that right?

A. Yes.

Q. The result is entirely from chance?

A. Yes.

Q. In this machine you insert a coin and after
41 you insert a coin you pull out a lever and a ball is released, propelled by your own action?

A. Yes, sir.

Q. It is entirely different than a slot machine?

A. Yes, sir.

Q. When you get free games you can play off those games if you choose?

A. Yes, sir.

Q. If you don't choose and if the proprietor elects to give you the amount of those free games in cash you take the cash?

A. Yes, sir.

Q. In this instance you played off eleven free games?

A. Yes, sir.

Q. You also took a dollar in cash?

A. Yes.

Q. At the time you took this in cash isn't the situation that your father called you and asked you to come on. Do you remember that?

A. I took my money. I stayed a little longer. As a matter of fact when I went out I bought Mr. Korpan a free drink and had thirty cents in change.

42 My children had gone to a show, and I was out of the establishment almost an hour and a half before I returned again.

Q. At this time you took the dollar your father had called you, had he not?

A. No, sir, I don't think so.

Q. Have you ever played slot machines?

A. A long, long time ago, many, many years ago on a penny machine in the State of Iowa.

Q. That was entirely different from this machine?

A. Yes.

Q. On this machine you manipulate it yourself?

A. Yes, sir.

By Mr. Herr: No further questions.

Redirect Examination

By Mr. Barnett:

Q. What does your manipulation of this machine consist of after you put your money in?

A. The ball is automatically released and up into the track it runs on, and you pull the plunger and you can regulate how far back you want it, and if you are lucky and don't tilt the machine you can wiggle it back and forth.

Q. If you are lucky?

43 A. Yes.

Q. And after the ball starts do you have any further control?

A. Just by that shaking. It will tilt.

Q. It will tilt if you jiggle it?

A. Yes.

Q. You mentioned you thought Korpan's Landing was a very nice place?

A. I sure did.

Q. You vacationed there a number of times?

A. Yes, sir.

Q. The place is run as a nice place?

A. It certainly is.

Q. You would not try to hurt Mr. Korpan?

A. I certainly wouldn't.

By Mr. Barnett: That is all.

By Mr. Herr: No questions.

(Witness excused.)

By Mr. Barnett: Mr. Shannon, will you take the stand?

44 JOHN M. SHANNON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barnett:

Q. Now, will you state your full name, please?

A. John M. Shannon.

Q. Where do you live, Mr. Shannon?

A. 1931 North Kilbourn Avenue, Chicago.

Q. What is your occupation?

A. Special agent, Intelligence Division, Internal Revenue Service.

Q. How long have you held that position?

A. Approximately three years.

Q. What are your duties in connection with that position?

A. Enforcement of the Internal Revenue laws and regulations.

Q. What educational background do you have?

A. Bachelor of Science, DePaul University in Chicago; Juris Doctor, DePaul University, College of Law, and I am a member of the Illinois Bar.

45 Q. Does the enforcement of the Federal Internal Revenue laws pertaining to the special occupational taxes on amusement devices and gaming devices fall within the purview of your duties?

A. Yes, sir.

Q. During the summer of 1955 did you have occasion to make some investigations pertaining to the special occupational tax pertaining to gaming devices?

A. Yes, sir.

Q. During the course of that investigation did you have occasion to visit the premises known as Korpan's Landing at Fox Lake, Illinois?

A. Yes, sir.

Q. When was that?

A. On August 12, 1955.

Q. On August 12, 1955?

A. Yes, sir.

Q. Did anybody accompany you there?

A. Special Agent Joseph Kelly.

Q. What time of the day or night did you go to Korpan's Landing?

A. Approximately 8:35 p. m.

Q. And when you went to Korpan's Landing what part of the premises did you go to?

46 A. We entered the tavern located on Korpan's Landing.

Q. Did you see on the premises the defendant in this case, Walter Korpan?

A. I did, sir.

Q. Can you point him out in the court room?

A. Yes, sir (indicating).

By Mr. Barnett: May the record show the witness has identified the defendant, Walter Korpan?

By The Court: Yes.

By Mr. Barnett:

Q. How long did you stay on the premises of Korpan's Landing in the tavern?

A. From approximately 8:36 in the evening until 2:35 a.m. on August 13th.

Q. Was the defendant Walter Korpan present on the premises throughout that time?

A. Yes, sir, he was.

Q. Did you have any conversation with him during the course of that evening?

A. Yes, sir, I did.

Q. Who was present during those conversations?

47 A. Special Agent Joseph Kelly was present at some of the conversations. Special Agent Joseph Kelly was there, and Mrs. Annette Veit was present at other conversations.

Q. Now, did you observe any coin-operated devices on the premises?

A. I did, sir. There were three bingo type machines, one bearing the name "Bally Hi-Fi;" another bearing the name "Bally Gaiety" and the other "Bally Variety."

Q. Are those names also on the machines which are Government's Exhibits 3, 4 and 5?

A. Yes, sir, they are identical in appearance to the machines I saw.

Q. They are identical in appearance to the machines you saw at Korpan's Landing?

A. Yes, sir.

Q. Did you play any of those machines?

A. I did, sir, from approximately 9:00 P.M. in the evening until about 11:30 in the evening of August 12. I played the Bally Gaiety machine for a major portion of the time, and played two or three games on the Hi-Fi machine.

Q. Did you have any conversations with the defendant Walter Korpan relating to the method of operation of
48 those machines?

A. I did, sir.

Q. Who was present at the conversation?

A. Special Agent Joseph Kelly was present.

Q. And yourself?

A. And myself.

Q. Will you relate what was said to you by Mr. Korpan and what you said to him if anything?

A. I asked Mr. Korpan what the objective was in playing the machines, and he said it was to get three, four or five lined up on the board at the back of the machine.

I asked him what the purpose of this would be, and he came around the bar and instructed me to drop a dime in the machine, which I did, and it lit up the first line of odds appearing on the machine.

Mr. Korpan explained if I got three of the numbers on the back of the board lit up in a row that the machine would register the number of replay games, and that I would win whatever amount, in cash, whatever amount was shown as replay games, using the numbers which appeared on the board, which indicated eighty cents, one dollar
49 twenty cents or twenty dollars, as the case might have been.

Q. What else transpired during that time?

By The Court: Will the Reporter reread that for me, please?

(Whereupon the answer was read by the Reporter as above recorded.)

By Mr. Barnett:

Q. Can you demonstrate that on one of the Government's exhibits?

A. Yes.

Q. Will you please step down and show us how that operates?

A. Mr. Korpan said—

Q. Now, will you step down here?

(The witness left the witness stand and stood in front of the machines, Government's Exhibits 3, 4 and 5.)

By Mr. Barnett:

Q. Is this machine in operation now?

A. Yes. Mr. Korpan instructed me to drop a dime in the machine, which I did. It activated the machines
50 and he then explained the objective of the game was to get three of the numbers appearing on this board.

Q. You are referring to the main board or the back board of the machine?

A. Yes.

Q. The main numbered squares, is that right?

A. Yes, sir.

To get three of the numbers lit. It was in a horizontal, diagonal, or vertical direction, and if I achieved this he would pay sixty cents, two dollars or nine dollars and sixty cents, which appear in the column on the back of the board, or that if—may I correct that instruction?

Q. Sure.

A. If I got three in a line he would pay sixty cents; if four were in a line he would pay two dollars, if five were in a line it would be \$9.60.

He then stated—

Q. Just a moment. Did he explain to you about the odds?

A. He then stated if I desired to increase the odds I could do so or take a chance of doing so by inserting more dimes in the machine, which I did in this fashion (demonstrating).

51 Q. What was the effect of that?

A. The effect of that, as he explained it, was to receive the payment of eighty cents, \$2.40 or \$10.00 for the accomplishment of getting three balls, four balls or five balls in a line.

Q. Did he make any further explanation of the machine?

A. He explained that by inserting more dimes into the machine I had the opportunity or possibility of increasing my odds or of achieving the magic pockets or magic lines that would increase the possibility of my winning on the machine.

Q. Did he describe to you how you could activate the balls which are placed or used in the play?

A. By pulling the plunger, you mean?

Q. Yes, did he explain that to you?

A. No, that portion he did not explain to me.

Q. Will you show us how you play a game on the machine?

A. By pulling the plunger back, releasing the plunger and permitting the ball to travel its course on the playing field of the board. If the ball enters a pocket it lights a corresponding number of the bingo chart on the back board.

52 Q. Complete your play on the machine.

A. (The witness operated the machine.)

Q. Now, the ball has landed in slot 25 which lights up number 25 on the back board, is that correct?

A. That is correct.

Q. Your objective further is to light up at least two more consecutive numbers?

A. That is right, sir, and in the position 25 is on the back board of this machine it would be necessary to light the numbers appearing above or below vertically, to the side, or horizontally. The diagonal play cannot be made here, in that the lines do not go diagonally.

Q. Go ahead and play out the rest of your balls.

A. (The witness operated the machine.)

Q. How many balls are there in operation, in the operation of this machine?

A. There are five balls in the operation of the normal game. At the completion of the game the player by inserting additional dimes has a chance of gaining additional balls. Additional balls may come into the machine or it may not.

Q. Will you describe what has happened since you
53 played the last ball?

A. The ball went into the pocket 8 on the playing field of the machine, lighting number 8 on the playing card on the back.

Q. In order to get a winner what is the next minimum thing you must do?

A. Place a ball in the number 6 hole on the playing field of the machine, which will light number 6 on the back board and score three numbers in a vertical row.

Q. Go ahead and play it.

A. (The witness operated the machine.)

Q. What happened after the playing of that ball?

A. Nothing.

Q. You lit up number 4?

A. The ball fell on the number 4 pocket.

Q. Now, you have lit on the board numbers 3, 25, 8 and

4.

A. That's right, sir, but there is only one ball remaining in the machine, which means the only possibility of winning at the present time is by lighting the number 6 or number 7 key, either one of which would give a line of three on the bingo card in the back.

54 Q. Will you go ahead and play your last ball?

A. (The witness operated the machine.)

Q. You have not succeeded in getting a winner?

A. No, sir.

Q. Do you have an opportunity of getting any more balls?

A. I do, sir, by thrusting the button on the front of the machine and by dropping additional dimes into the machine, then I may or may not get additional balls.

Q. Was that explained to you by Mr. Korpan?

A. It was, sir.

Q. Will you see if you can get any additional balls?

A. (The witness operated the machine.)

I succeeded.

Q. All right. Will you play the extra ball?

A. (The witness operated the machine.)

Q. What did you get for your extra ball?

A. I got the possibility in two directions, to score a winner on the card by attempting to purchase a second ball and inserting another coin in the machine.

Q. Will you see if you can purchase an extra
55 ball.

A. (The witness operated the machine.)

Q. Now you have placed another dime in the machine, have you?

A. Yes, sir.

Q. What has been the effect of placing that dime in the machine?

A. I did not receive an extra ball. The machine merely lit the number 2 of the second one appearing on the face of it.

Q. What do you do now?

A. If I desire to continue trying for an extra ball I press a button again and place another dime in the machine.

Q. Will you try that?

A. (The witness operated the machine.)

Q. What happened as a result of your placing an extra dime in the machine?

A. I failed to get an extra ball. In order to attempt to get an extra ball again it would be necessary to drop another dime.

Q. I see. How often could that go on?

A. Indefinitely.

Q. Now, what degree of control would you exercise
56 or have you exercised over the ball while you have been playing the machine?

A. None. I could attempt to gauge the amount or the distance by which I pulled the plunger back in an attempt to have the ball start its downward path on the playing field at a desired location on top of the board.

However, in my demonstration I didn't make any such attempt, and normally don't, inasmuch as I have been unable to succeed in getting a ball to travel in any particular pattern.

Q. On this machine, Government's Exhibit 5 for identification, is there any means of controlling the ball after it has been set to play by the plunger?

A. There is no means of controlling the ball after that time.

Q. You may go back to the witness stand, Mr. Shannon:
(Thereupon the witness returned to the witness stand.)

Q. (Continuing) Now, during the course of the evening, Mr. Shannon, you played the machines which were
57 in Korpan's Landing and which bore what names?

A. The machines I played bore the names "Bally Gaiety" and "Bally Hi-Fi."

Q. The "Bally Gaiety" machine, is that identical in appearance with Government's Exhibit 5 for identification?

A. It is, sir.

Q. During the course of the evening did you win any games on the machines?

A. Yes, sir. At approximately 11:30 p.m. I won twelve replays on the machine, at which time I said to Mr. Korpan, that I was going to discontinue playing the machine, that I

had lost enough money on it at that time. Mr. Korpan immediately went to the cash register and removed \$1.20 which he paid to me. He then came around from the bar and pressed the button on the machine, which removed the twelve replay games which had registered on the machine.

Q. What machine did you win that on?

A. The Bally Gaiety.

Q. That machine you have just been demonstrating?

A. It is identical to the machine I have just been demonstrating.

58 Q. Will you come back to this and show us where the winning games would show?

(The witness left the stand and stood in front of the machine, Government's Exhibit 5 for identification.)

A. Yes, sir, there is a replay register appearing in the upper lefthand corner of this machine, on the back.

Q. And that registers the number of games you are entitled to play free or receive money for, is that correct?

A. That is right, sir.

Q. What did Mr. Korpan do after you told him you wanted your money instead of playing for the games, what did he do to the machine?

A. He came to the machine, reached underneath the machine, pressed a button, and the games came off the machine.

Q. The games that were registered on the meter disappeared?

A. Yes, sir.

Q. And it went back to zero?

A. Yes, sir.

By Mr. Barrett: You may return to the witness stand.

(Thereupon the witness returned to the witness stand.)

By Mr. Barnett:

Q. Now, did you see any other people play the machines during the course of the evening?

A. Yes, sir. From approximately 8:40 till 9:00 p.m. I watched Annette Veit play the Bally Variety machine that was on the premises, and at 9:00 p.m. she stated to Walter Korpan that she was cashing in ten games, games that appeared on the replay register at that time.

Walter Korpan said O.K., went to the cash register, withdrew a dollar from it, which he then paid to Mrs. Veit.

Q. Did you have any further conversations with Mr. Korpan, the defendant?

A. I did, sir. At approximately 2:15 a.m. the morning of August 13 I identified myself to Mrs. Veit and Walter Korpan, and at that time I immediately advised Walter Korpan that he need not make any statement to me or furnish me with any information which might tend to incriminate him under the Federal laws, and that, any-
60 thing he might say could be used against him at a later proceeding by the United States.

I asked him if he understood this and he said he understood it fully.

I asked him if he had received or if he recalled receiving the information from Special Agent Lonchar at approximately on or about June 15, 1955, concerning his obligation to purchase a coin-operated gaming device stamp prior to making pay-outs for replays won on coin-operated machines, and he said he recalled that and that he fully understood the information Mr. Lonchar had given him.

I asked him at the time Mr. Lonchar had spoken to him if he had been paying off on these machines, and he said yes, he had.

I asked him if he had been paying off ever since then and he said he had.

I then advised him a second time that he need not furnish me with any information which might tend to incriminate him, and he said he fully understood this.

I then asked him if he did not pay Mrs. Veit one
61 dollar that evening for her winning ten replay games on the machines, and he said yes. He admitted making the payment.

I asked him if he did not also pay me \$1.20 for having won twelve replay games on the second of his machines, and he said yes, he did.

I asked him if he fully understood his obligation to purchase a coin-operated gaming device stamp prior to making such payments, and he said yes, he knew that.

I asked him if he made these payments of his own free will, or whether he was compelled by any other person to make the payments, and he said he made them himself of his own free will.

Q. Is that all?

A. May I refer to my notes?

Q. Have you repeated the conversation to us as fully as you can remember?

A. Yes, sir, substantially so, sir.

By Mr. Barnett: You may cross examine.

Cross Examination

By Mr. Herr:

Q. Mr. Shannon, in playing this game did you note
62 there is some element of skill involved in the amount of pressure you apply or the springiness you apply to the ball itself, to the cylinder?

A. It is possible to exercise a minimum amount of control in pulling the plunger back in the attempt to have the ball start its downward line in the playing field at a certain desired location.

Q. Have you finished your answer now?

A. Yes, sir.

Q. To the extent to which you use that plunger or the distance that you draw it back and release it will that control in a degree whether or not the ball will go towards one side of the downward face or another?

A. To that extent, possibly yes.

Q. Have you noticed that on the machine and at the place where the plunger sets there is a gauge which shows the markings across where you might hold the plunger and the ball before releasing it?

A. Yes, there is.

Q. And that is done with the purpose of either enlarging the distance the ball can travel or the speed at which it will travel and the area it will travel?

63 A. It may be for that purpose, sir.

Q. Did you try it?

A. Yes, sir, I did.

Q. In addition to that did you note that by slightly pushing the machine, not hard enough to cause a tilt, but slightly tilting it you can also control the ball?

A. No, sir, I did not have that experience. I did try it, sir.

Q. You did try it?

A. Yes, sir.

Q. But when the machine registers a number of replays the machine then automatically permits the replay?

A. Yes, sir.

Q. And you can use that replay?

A. Yes, sir.

Q. When you use it you can't redeem it?

A. That is correct.

Q. It is up to you whether you want to redeem it or not, and whether the owner of the instrument will repay it?

A. That is correct, sir.

Q. In this instance Mr. Korpan told you any games
64 you did not play he would redeem at ten cents a game?

A. Yes, sir.

Q. That is the amount you paid for a game?

A. That is the amount I paid to originally activate the play. For the play, as I paid the machine, I inserted between four and fifteen times before playing the game, each individually.

Q. I see. That would multiply the number of odds or the number of replays you would get?

A. It might, yes, sir; it might or might not.

Q. Thereafter you would put into play and motion and propel a particular pellet or ball for its course down that machine?

A. Yes, sir.

Q. And did you always apply the same pressure?

A. No, sir, I did it rather haphazardly after a fashion, shooting two or three balls at a time.

Q. You did not try to develop any particular control or skill over the movement of that ball?

A. I certainly did try to, sir, but I gave up.

Q. You gave up?

A. Yes, sir.

Q. But you have known people who have been quite
65 successful in controlling that?

A. No, sir, I have not known of any person being successful in controlling the ball.

Q. You have known them to be successful insofar as controlling the site of the surface the ball will travel?

A. Yes, sir, you can do that with a degree of success.

Q. You have that control?

A. Yes, sir.

Q. And you also have some little control by pushing the side of the machine when the ball is on its course?

A. No, sir, because the machine tilts.

Q. That is, if you push it too hard?

A. Yes, sir, if you push it too hard.

Q. In order to control it.

A. Yes.

By Mr. Herr: That is all, Mr. Shannon.

Redirect Examination

By Mr. Barnett:

Q. During the court of the evening when you were
66 out there how much money did you put into these machines?

A. Approximately fifteen dollars, I myself.

Q. What is the total amount of money or total amount of free plays you won?

A. Approximately thirty, sir.

Q. At ten cents a game that would be three dollars in money for you?

A. If I cashed them in.

Q. You played off twenty of them?

A. That is correct. No, I played off eighteen.

Q. And you cashed in for twelve?

A. Yes, sir.

By Mr. Barnett: That is all.

(Witness excused.)

By Mr. Barnett: Mr. Kay, will you take the stand.

GEORGE A. KAY, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barnett:

Q. Will you state your full name, please?

67 A. George A. Kay.

Q. Where do you live, Mr. Kay?

A. 25 North Holly Avenue.

Q. Where?

A. Holly Avenue.

Q. In what city or town?

A. Fox Lake, Illinois.

Q. What is your occupation?

A. I am a service man for Grant Novelty Company.

By Mr. Herr: I didn't hear that.

By The Witness: I am a service man for Grant Novelty Company.

By Mr. Barnett:

Q. What business is Grant Novelty Company engaged in?

A. In the operation of bingo machines.

Q. Such bingo machines as the Government has presented here as Government's Exhibits 3, 4 and 5 for identification?

A. Yes.

Q. What does the operation of these machines consist of, how does their organization work? They don't have all machines gathered in one spot, do they?

68 A. No, they are distributed between different taverns, resort areas, amusement houses.

Q. Were any of these machines of the Grant Novelty Company placed at Korpan's Landing?

A. Yes, sir.

Q. Do you know the defendant, Walter Korpan?

A. Yes, sir.

Q. Do you see him in the court room?

A. Yes, sir.

Q. Will you point him out, please?

A. The fellow in the blue suit.

By Mr. Barnett:

May the record show the witness has identified the defendant?

By The Court: Yes.

By Mr. Barnett:

Q. Now, how many spots does the Grant Novelty Company have, or locations in which they have these machines situated?

By Mr. Herr: I object to that as immaterial in this case.

By The Court: How many what?

By Mr. Barnett: How many locations does the Grant Novelty Company have these machines in?

69 By The Court: What is the materiality of that?

By Mr. Barnett: Well, I want to show the nature of this man's activity, how he went from place to place and collected money.

By The Court: Overruled:

By Mr. Barnett: You may answer.

By The Witness:

A. As far as locations, I would have to stop and think. Pieces of equipment out I could be more definite on.

By Mr. Barnett:

Q. How many are out?

A. I would say approximately 42 to 44.

Q. Approximately how many location are these pieces of equipment distributed between?

A. Approximately 30 to 33.

Q. 30 to 33?

Q. How many pieces of equipment were located at Korpan's Landing?

A. Three, sir.

70 Q. Three. That is true of what period of time, that you had three pieces of equipment at Korpan's Landing?

A. Well, from the summer of '54 there were three pieces in there until late in the fall, when we removed one piece.

Q. In the fall of 1954?

A. Yes, and in the spring of 1955 we installed one other, so there were three in there in the summer of 1955.

Q. There were three machines there in the summer of 1955?

A. Yes, sir.

Q. As a service man what do you do?

A. I service and collect on them. Collection day is Monday, and after that the rest of the week we take care of any trouble that might occur in the machines, and if we don't have any of that we have machines in the shop for overhauling.

Q. Are you able to make your collections in one day?

A. Yes, sir.

Q. You go from spot to spot?

A. Yes, sir.

71 Q. Does anyone accompany you in your rounds?

A. Yes, sir.

Q. Who?

A. Mr. Techaus.

Q. Are his functions the same as yours are, with the Grant Novelty Company?

A. Yes, sir.

Q. Now, when you go into a location to make your collections will you describe for us precisely what you do physically? You may demonstrate on these machines if it would be helpful.

A. When I go into a location I open the door and there is a meter reading. I take that down.

There is a meter reading on the cash can for the previous week. I remove the cash can and write the current meter reading above the prior one, and subtract the difference. I count the cash and take the difference between the two numbers, and reimburse Mr. Korpan the difference.

Q. That is, you reimburse Mr. Korpan or whoever the proprietor is for the difference?

A. Yes, sir.

Q. You say there is a meter inside?

A. Yes.

72 Q. Which on this machine, Government's Exhibit 5 for identification, now registers what, is it 5401?

A. Yes, sir.

Q. That meter is called a replay meter?

A. Yes, sir, that meter determines whether the replays are knocked off or whether they are replayed.

Q. I see. Now, when a player wins on a machine such as Government's Exhibit 5 for identification there is a meter reading on the face of the board that registers the number of plays he wins?

A. Yes, sir.

Q. If he plays those off is there any register of the replays on the meter inside of the machine?

A. No, sir, not if they are played off.

Q. If, instead of that he is reimbursed in cash or merchandise is there anything done to the machine by the proprietor to take off the face of the board those winning figures?

A. Yes, sir.

Q. What does he do?

A. It can be done in this manner, by pressing this button under here.

Q. Does that button—do you have a knock-off—
73 button?

A. No, sir. You can call it a cancellation button. It will cancel those, and reshow them on this one (indicating).

Q. After you have taken off the meter reading on that day you then write that on a piece of paper and replace it inside the machine?

A. Yes, sir.

By Mr. Barnett: You may go back to the stand now.

(Thereupon the witness returned to the witness stand.)

By Mr. Barnett:

Q. Now, did you visit Korpan's Landing to see these machines on the Mondays during the months of June, July and August of 1955?

A. Yes, sir.

Q. Did you make collections of the type you have described to us just now at Korpan's Landing on each of those Mondays?

A. Yes, sir.

Q. On each of those Mondays did you make any allowance to Mr. Korpan for replays that were registered on the replay meter within the machines?

74 A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. Can you identify the machines that were in Korpan's Landing?

A. Yes, sir, there was a Bally Variety, a Bally Gaiety, and a Bally Hi-Fi.

Q. Such as these machines that are here in the court room in evidence now as Government's Exhibits 3, 4 and 5? No. I believe they are for identification.

A. Yes, sir.

By Mr. Barnett: You may cross examine.

By Mr. Herr: No questions.

By Mr. Barnett: You may step down, Mr. Kay.

(Witness excused.)

By Mr. Barnett: Mr. Ross, will you take the stand?

LOUIS V. ROSS, called as a witness on behalf of the Government having been first duly sworn, was examined and testified as follows:

75

Direct Examination

By Mr. Barnett:

Q. Will you please state your full name?

A. Louis V. Ross.

By The Court: How do you spell your first name?

By The Witness: L-o-u-i-s.

By The Court: V?

By The Witness: Yes.

By The Court: Is that R-o-c-k?

By The Witness: No, it is Ross, R-o-s-s.

By Mr. Barnett:

Q. Where do you live, Mr. Ross?

A. 295 Garfield Avenue, Fox Lake, Illinois.

Q. What is your occupation?

A. General contractor.

Q. Do you have any other occupation also?

A. Yes, sir.

Q. What is that?

A. I am a village magistrate.

Q. Police magistrate?

A. That is right.

Q. Of the Village of Fox Lake?

A. That's right.

76 Q. Directing your attention to October 11, 1955 did you have occasion to visit the premises known as Korpan's Landing in Fox Lake, Illinois?

A. I did.

Q. On that evening?

A. Yes, sir.

Q. Were you accompanied by anyone?

A. Yes, sir.

Q. By whom were you accompanied?

A. Sergeant Wilkie of the Fox Lake police department.

Q. Anybody else?

A. Yes, sir.

Q. Who else?

A. Gordon, a policeman of Fox Lake.

Q. After you entered the premises of Korpan's Landing did you see Walter Korpan, the defendant in this case, on the premises?

A. I did.

Q. Do you see him in the court room now?

A. Yes, sir.

Q. Can you identify him?

A. The gentleman in the blue suit and the yellow tie.

77 By Mr. Barnett: May the record show the witness has identified the defendant?

By the Court: Yes.

By Mr. Barnett:

Q. Did you have a conversation with Mr. Korpan at that time and place?

A. I did.

By Mr. Herr: What was the date? I didn't get it.

By Mr. Barnett: October 11.

By Mr. Herr: I want to object to it. It is subsequent to the time in question.

By Mr. Barnett: It relates to the admissions pertaining back to the indictment, your Honor.

By the Court: Very well. Proceed.

By Mr. Barnett:

Q. Will you state what you said to Mr. Korpan and what Mr. Korpan said to you at that time and place?

A. I went in the tavern and I talked to Mr. Korpan and I asked him if he had purchased three gaming stamps. He stated that he had.

Q. Is that Federal gaming stamps?

78 A. Yes, sir.

Then I asked him why and he stated, "Because I had to," and "because I paid a woman one dollar."

I said, "I don't mean why. What type of device did you purchase the tax stamp for?" And he pointed to the three pin ball machines that are in this room at this time.

I asked him if these particular machines were used for gaming, and he stated, "Yes, sir."

I asked him if he knew I would have to confiscate the machines, and he said yes, so I had the machines picked up and brought to the village hall, and a summons was issued for his appearance in my court room on the 14th day of October at 7:00 p.m.

Q. On the 14th day of October at 7:00 p.m. did you have a further conversation with Mr. Korpan?

A. Yes, I did.

Q. Where did that conversation take place?

A. At the village hall in the Village of Fox Lake.

Q. Who was present?

79 A. The hearing was called for 7:00—for 8:00 p.m.

The mayor of the village was present, the witness, Sergeant Wilkie was present, they were there.

The case was called, the defendant was sworn in, the defendant pled guilty to the charge of gambling in the Village of Fox Lake.

Q. Did you have a conversation with him prior to the plea?

A. Yes, I did. I reminded him he was under oath and I asked him to state to me the conversation that we had on the previous evening when we were at his establishment.

He related to me that he bought a gaming stamp, and he continued the conversation or he repeated the conversation that we had had on the night in question, on the 11th.

Q. Now, can you identify Government's Exhibits 3, 4 and 5 for identification as the machines which you confiscated from Korpan's Landing?

A. Yes, sir, I can.

Q. Will you examine them, please, and show us how you identify them as those machines?

80 (The witness left the witness stand and stood in front of the machines, Government's Exhibits 3, 4 and 5 for identification.)

By the Witness:

A. In the process of removing the machines from Fox Lake there were certain marks put on by the machine being put on a truck.

Here is one, also on the side, and here (indicating), and also the stamps bearing the village license number 17.

By Mr. Barnett:

Q. Were they on the machines, and are they on the machines now?

A. Yes, up in this corner right here (indicating).

By Mr. Barnett: Will you take the stand again, please? (Thereupon the witness returned to the witness stand.)

By Mr. Barnett:

Q. When you visited Korpan's Landing on October 11, 1955 were these machines in operating condition?

A. Yes, sir, they were.

81 Q. Were they lit up?

A. The lights were up and they were stationed directly in front of the bar.

Q. Did you do anything to change the operation of the machines when you confiscated them?

A. No, sir, I did not.

By Mr. Barnett: Your Honor, I will offer in evidence as Government's Exhibits 3, 4 and 5, Government's Exhibits 3, 4 and 5 for identification.

By the Court: They may be received.

(Said machines, so offered and received in evidence, were marked Government's Exhibits 3, 4 and 5.)

By Mr. Barnett: You may cross examine.

Cross Examination

By Mr. Herr:

Q. You are the police magistrate in the Village of Fox Lake?

A. That is right.

Q. When did you first learn of the existence of these pin ball machines at Korpan's Landing?

82 A. I was notified earlier on the day of the 11th that gaming stamps were purchased for Korpan's Landing.

The mayor asked me to investigate that evening to find out the nature of the machine that the stamp was to be issued for.

Q. That it was issued for?

A. That's right.

Q. Do you know when the mayor got that information?

A. The mayor received the information from a radio report on, I believe it was, Station WKRS, Waukegan.

Q. On what date, the same date?

A. The 11th day of October.

Q. That was after Mr. Korpan had bought three gaming stamps on September 21, 1955?

A. That is right.

Q. And within less than three weeks thereafter, after buying gaming stamps, you removed those machines from his premises?

A. That is right.

Q. Prior to that time how long had you known of those pin ball machines being there?

83 A. I did not know the machines existed in Korpan's Landing at that time.

By Mr. Herr: I see. That is all.

Redirect Examination

By Mr. Barnett:

Q. Does the city or Village of Fox Lake license machines for amusement purposes?

A. Yes, sir, they do.

Q. How much do they charge per machine for the license?

A. The license fee for each machine is \$25.00.

Q. When you examined Government's Exhibits 3, 4 and 5 did you find evidence on those machines of licenses having been issued?

A. Yes, sir.

Q. By the Village of Fox Lake?

A. That is right.

Q. Appearing in the upper lefthand corner of each machine?

A. That is right.

Q. Are those licenses issued on machines that pay money?

By Mr. Herr: That is objected to.

By the Court: What is that question?

84 By Mr. Barnett: Are those licenses issued on machines that pay money?

By the Court: He may answer.

By the Witness:

A. License is issued for amusement only.

By Mr. Barnett:

Q. That is, for machines used for amusement purposes only, is that correct?

A. That is right.

Q. Not for machines that pay money?

A. That is right.

Q. If a machine entitles a person to receive money if they don't pay money out themselves, may amusement licenses be issued for them?

A. I beg your pardon?

Q. If the playing of the machines entitles a person to receive money or merchandise in any way, shape or form, rather than spitting the money out itself, may the license be issued?

A. No.

By Mr. Barnett: That is all.

Recross Examination

By Mr. Herr:

Q. Have you got a copy of the ordinance relating
85 to that license?

A. I believe we have.

Q. You don't have it with you?

A. No, sir.

Q. Can you state it?

A. No, sir, I cannot.

By Mr. Herr: No further questions.

By Mr. Barnett: You may step down.

(Witness excused.)

ALBERT F. HOFFMEIER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barnett:

Q. Would you please state your full name?

A. Hoffmeier, Albert F. Hoffmeier.

By the Court: How is your last name spelled?

By the Witness: H-o-f-f-m-e-i-e-r.

By Mr. Barnett:

Q. Where do you live, Mr. Hoffmeier?

A. Fox Lake, Illinois.

86 Q. And what is your occupation?

A. I am an automobile parts jobber.

Q. Do you have any other occupation?

A. I am president of the Village.

Q. You are president of the Village of Fox Lake?

A. Right.

Q. Directing your attention to the evening of October 14, 1955, were you present at a hearing in the village hall in Fox Lake at which the defendant, Walter Korpan, appeared?

A. Representing myself as liquor commissioner, yes.

Q. You also hold the title of liquor commissioner?

A. All presidents do, yes, sir.

Q. Will you state who was present and what occurred at that time and place?

A. There was Mr. Gordon; the police magistrate, Louis Ross; and Sergeant Wilkie.

Q. What occurred?

A. We had an investigation on gambling within the city limits, the village limits.

Q. And was there a conversation there?

A. There was a conversation. The magistrate asked Mr. Korpan if he had gambling on the machines, 87 and he said he had gambled at the time the Government men were there but he had not gambled before or after.

Q. That is what he said?

A. Yes, that they were not used for that purpose.

Q. Only on the night the Government man was there?

A. That is what he told the magistrate.

Q. After that proceedings was over what happened to the machines?

A. They were turned over to me to dispose of.

Q. Have they been in your custody?

A. They have been in my custody until you picked them up.

Q. Was there anything done to change the operation of the machines while they were in your custody?

A. No, sir, nothing.

By Mr. Barnett: I have no further questions.

By Mr. Herr: No questions.

(Witness excused.)

88 ALVIN J. GOTTLIEB, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barnett:

Q. Now, will you state your full name, please?

A. Alvin J. Gottlieb, G-o-t-t-l-i-e-b.

Q. And your occupation?

A. Treasurer and advertising manager for D. Gottlieb & Company.

Q. For D. Gottlieb Company?

A. Yes, sir.

Q. Who is D. Gottlieb?

A. He is a manufacturer of coin machine devices.

Q. Does the letter D refer to a man's name?

A. It is the name of the corporation. It is also the initial.

Q. Of whom?

A. The initials of my mother and my father and my son.

Q. Your father is in this business also?

A. Yes, sir.

Q. Now, how long have you been employed by The
89 Gottlieb Corporation?

A. Eight years.

Q. In what capacity?

A. Primarily as advertising manager, and originally I learned the business in the experimental and engineering department.

Q. I see.

A. For about a year.

Q. What educational background do you have?

A. A year and a half of electrical engineering.

Q. What business is the Gottlieb Corporation in?

A. They manufacture coin-operated amusement devices.

Q. They manufacture coin-operated amusement devices?

A. Yes, sir.

Q. What are the names of some of those devices? Are there different types of coin-operated amusement devices?

A. Yes, sir, many.

Q. What other types does Gottlieb Corporation manufacture?

A. At one time the corporation made a grip test-90 ing device, and they made a shuffle board type of coin-operated machine, and basically pin ball machines, amusement pin ball machines.

Q. Can you describe for us the operation of the amusement pin ball machine?

A. Yes, sir. The amusement pin ball machine is played by the insertion of coins upon which the player is presented with the opportunity of playing five times on the play board of the machine.

He inserts the coin and the balls are released to the ball mechanism which elevates the ball, whereupon the player pulls back the plunger and releases it, which propels the ball out on the playing field.

It then bounces from various contacts, which score points or high score, or whatever it may be.

On the playing field there are what is called flippers in the trade or electrically controlled devices controlled by the player or by buttons on the side of the machine.

Then by the proper coordination and use of these buttons the player is able to flip the ball back, the idea being 91 to achieve a high score which will award free plays.

Q. Now, are you familiar with the machines, not the identical machines but the type of machines represented here by Government's Exhibits 3, 4 and 5?

A. Yes, sir.

Q. Are you familiar with the manner in which they are constructed?

A. Yes, sir, I am.

Q. Are you familiar with the various mechanisms and how they operate?

A. Well, I have a limited knowledge of the mechanism.

Q. Are these machines which are here in evidence as Government's Exhibits 3, 4 and 5 the amusement type pin ball machines?

A. Amusement type pin ball machines?

Q. Yes.

A. That is an opinion.

Q. Will you please state your opinion?

A. Yes, on an opinion basis, sir, some people consider gambling an amusement.

By Mr. Herr: I move that answer be stricken.

92 By Mr. Barnett:

Q. Are these machines which are here in evidence as Government's Exhibits 3, 4 and 5 the type of amusement pin ball machines that you have described previously?

A. No, sir, they are not.

Q. They are not?

A. No, sir.

Q. Will you step down here and show us how these machines operate and show us what is the prime difference between Government's Exhibit 5, for example, and an amusement type pin ball machine.

(Thereupon the witness left the stand and stood in front of the machine, Government's Exhibit 5.)

By The Witness:

A. The major difference between this type of machine and our amusement type pin ball machine lies in the predominance of skill in the operation of our machine.

After the ball comes down the playing field he can, by skill and coordination, maneuver the ball back up the playing field again for higher scores.

93 Our machines also have high scores on them, where the score is being continuously added up and totaled throughout the time of the play.

The scores range from hundreds up into thousands, ten thousands or millions, et cetera, whereas the main objective of these machines is to—

By Mr. Herr: Wait a minute. That I will object to.

By The Court: What is that?

By Mr. Herr: He was about to state his conclusion on some type of machine. He said the main objective of this machine is—and I objected.

The main objective is as it is depicted there.

By The Court: He may state. He ought to be an expert on it.

By The Witness:

A. (Continuing) The main objective is to shoot the balls into the pockets and line up the various combinations and win free plays on the meters indicated up in the corner.

94 By Mr. Barnett:

Q. Now, on the amusement type machines is there a meter up in the corner which registers free plays?

A. Yes, there is.

Q. On the amusement type machine is there also a meter inside the machine which registers the replays?

A. No, sir, there is not.

Q. Is there a button which discharges the replays from the top of the machines and records them someplace inside the machine, on the amusement type machine?

A. No, there is not.

Q. Now, will you tell us how much money you can put in this machine, Government's Exhibit 5, in order to play one game?

A. I don't quite understand what you mean.

You can insert one coin and play an entire game.

Q. How many more coins may you insert? Is there a limit on the number of coins you may insert?

A. No.

Q. To play one game?

95 A. No, there is no limit.

Q. How much will the machine hold?

A. I have no idea.

Q. On the amusement type pin ball machines is there any limit on the number of nickels or dimes that may be inserted in order to play one game?

A. There is a limit in that machines are so made they, upon insertion of the first coin the scoring device is reset, whereupon if any additional coins are inserted absolutely

nothing else happens except the coin stays inside the machine.

By Mr. Barnett: Will you return to the stand?

(Thereupon the witness returned to the witness stand.)

By Mr. Barnett:

Q. In other words, there is no benefit to inserting additional coins?

A. No, sir.

Q. It doesn't increase the odds?

A. No, sir.

Q. On this machine the odds do increase?

A. Yes, sir.

Q. Is that a fact, that they always increase?

96 A. No, sir, they don't change every time.

Q. They may increase or they may not?

A. That is correct.

Q. Now, in the operation or manipulation of these machines what degree of control is exercised by the player of the machine? I am referring now to Government's Exhibit 5.

A. Well, the use of the plunger will enable a player to exert an amount of skill on placing the ball somewhere in the vicinity of the desired hole in the four portions of the board, whereas further down on the board the degree of skill in bumping the machine depends on how sensitive the tilting device is.

Q. In other words, if you bump it a little and the machine is tight, as they say, it will tilt quickly?

A. Yes, sir.

Q. And if the machine is loose it may not tilt?

A. Yes, sir.

Q. Is any other control that may be exercised over that ball possible?

A. Outside of the use of the bumping, I don't
97 think so, sir.

Q. Is there any control exercised by the mechanism within the back board of the machine which limits the opportunities of the player's success?

A. I believe you mean the point at which the player wins, or do you mean—

Q. The number of games he may win. Can you open up the back of that machine and show us the mechanism?

A. I think so. Do you have a key?

(Thereupon the witness left the stand and stood in front of the machine, Government's Exhibit 5.)

By Mr. Barnett:

Q. Would you be able to explain this better with the machine in operation? We will turn the machine around.

A. Yes. Well, it wouldn't make much difference unless you could see it quite closely.

Q. I see. Will you explain to us, Mr. Gottlieb, how the machine operates with respect to the search disc and with respect to the reflex unit and with respect to these devices up here that I don't know the name of, ball detection
98 relay, I think they are called.

A. Well, the search mechanism is a wire directly to the holes on the playing field, and that is used to determine whether there is a winning combination made or not.

Each ball that is dropped into a hole, there is a switch under that hole, and that switch is wired to this mechanism back here.

This mechanism I think runs continuously, but I am not sure, and at any time throughout the game I think after a certain number of games are shot this mechanism starts operating, and it is searching over the various combinations on the play field in order to determine if a win has been made.

Is that all?

Q. No, go on and tell us what happens to this device up here which appears to be captioned "Ball detection relay."

A. That is not a ball detection relay, that is a mechanism which determines whether the player will receive higher odds or additional balls as he deposits the coin.

99 Q. How does it go about determining that?

A. This motor on the side turns the discs and on the insertion of the coin these tooth gears are released and they rotate around the mechanical components.

At certain times ratchets engage these gears, and the mechanism stops, and I believe another lever drops or trips, and at that time if a combination is made in here

which determines whether the player will get additional balls or higher odds, then another mechanism inside the machine sets those lights across there to indicate that.

Q. I see. Does anything happen in connection with—what do you call these (indicating)?

A. Gears.

Q. Does anything happen with respect to these gears in the event a large winner has been gained on the machine, with respect to the next game or the next player? In other words, is there any control exercised by those devices other than the number of large winners?

A. Yes, sir, there is a device known as a reflex unit inside the machine which is a compensator and more 100 or less balances out the high winnings as against the small winnings, and enables the machines to compensate for people winning a tremendous amount of free games on the machine, and more or less balances out the number of games won during a play period.

By The Court: Can that device be adjusted?

By The Witness: Sir?

By The Court: Can that device be adjusted?

By The Witness: I don't think so. I think that is a set gear arrangement that runs all the time.

By The Court: Can it be readjusted?

By The Witness: Well, I imagine so. Yes, sir.

By The Court: What is it set for now?

By The Witness: Well, as far as the adjustments are concerned I think it can only be adjusted more than—well, that is something else.

I think what can be done is to adjust them to be set so they could leave it pay off more all the time, if 101 they want to, by disconnecting it.

By The Court: If it were paying too much how could it be adjusted?

By The Witness: Well, by disconnecting the wires on the unit up here to prevent the odds from going up.

Is that all?

By Mr. Barnett:

Q. Now, with respect to tilting the machine, if a player attempts to exercise some control over the ball after it falls down into the playing field, by moving the machine around, you said earlier the machine might tilt?

A. Yes, sir.

Q. What effect occurs on the machine in the event the tilting occurs?

A. The entire machine turns off and the light comes on indicating the machine has been tilted, and the game is over from that point.

Q. Do you get your money back?

A. No, sir.

By Mr. Barnett: You may take the stand.

(Thereupon the witness returned to the witness stand.)

102 By Mr. Barnett:

Q. In your opinion as an expert does chance or skill play a pertinent part in winning on these machines?

By Mr. Herr: That is objected to. It is not a question of which is pertinent.

By Mr. Barnett: I can ask that question, can't I?

By The Court: He may answer.

By The Witness:

A. Well, the chances of winning on it are predominately by chance.

By Mr. Barnett: You may examine.

Cross Examination

By Mr. Herr:

Q. Is there any element of skill involved?

A. Yes, sir.

By Mr. Herr: That is all.

Redirect Examination

By Mr. Barnett:

Q. Is the element of skill involved, is that what you described to us as being the operation of the lever
103 and plunger?

A. Yes, sir.

Q. And the nudging of the machine so it may tilt?

A. The idea is to try to bump the machine slightly to push the ball up to a high pocket.

By The Court: But if you bump too hard?

By The Witness: Then the machine tilts.

By The Court: And you have lost your money?

By The Witness: Yes, sir, all circuits are disconnected.

By Mr. Barnett: That is all. You may step down, Mr. Gottlieb.

(Witness excused.)

MINA SCHERWAT, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barnett:

Q. Would you state your full name, please?

104 A. Mrs. Mina Scherwat.

By The Court: Your last name, please?

By The Witness: S-c-h-e-r-w-a-t.

By Mr. Barnett:

Q. Where do you live, Mrs. Scherwat?

A. Grayslake, Illinois.

Q. What is your occupation?

A. I am assistant chief to the control accounts of the Director of Internal Revenue.

Q. Are payments on taxes received in your office?

A. Yes, sir.

Q. Including Lake County, Illinois?

A. They are received in the cashier's division.

Q. I see. Have you had occasion this morning to search the records of the cashier's office?

A. Yes, sir, I did.

Q. To find out whether or not a payment for a coin-operated gaming device stamp was made by Mr. Walter Korpan on or about August 12, 1955 for the fiscal year 1956?

A. There was a payment made on September 21st.

Q. At the time he filed the return?

A. On the gaming device.

By The Court: What was that date?

105 By The Witness: September 21, 1955.

By Mr. Barnett:

Q. Was there any payment made prior to September 21, 1955?

A. Not that I could locate this morning.

Mr. Barnett: That is all.

Cross Examination

By Mr. Herr:

Q. That payment was \$250.00 per machine?

A. Be! pardon?

Q. That payment was \$250.00 for three machines, \$250.00 each?

A. Yes, sir, for three machines.

Q. The amount of the payment then was \$750.00, Mrs. Scherwat?

A. Yes, for three machines, \$250.00 apiece.

Q. What is that \$75.00 on there?

A. That is the penalty.

Q. I see.

A. That is for the late filing, the late payment.

Q. In other words, he paid \$825.00?

A. \$750.00 for the machines and \$75.00 for the penalty.

106 By Mr. Herr: I see. That is all, Mrs. Scherwat. (Witness excused.)

By Mr. Barnett: The Government rests, Your Honor. And Thereupon the Government Rested Its Case in Chief.

By Mr. Herr: Now, if the Court please, the defendant moves for an acquittal in that there has been no offense shown violative of the Act averred to have been violated by the terms of the indictment.

By The Court: Are you going to put in any evidence?

By Mr. Herr: Only as to the mechanism of the machine, your Honor.

By the Court: Put it in and let's get it over with.

By Mr. Herr: All right, your Honor.

107 And Thereupon The Defendant, To Maintain The Issues On His Behalf, Introduced The Following Evidence To Wit:

ROBERT H. BREITHER, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Herr:

Q. Will you state your name, please?

A. Robert H. Breither.

Q. Spell the last name.

A. B-r-e-i-t-h-e-r.

By The Court: Spell that again.

By The Witness: B-r-e-i-t-h-e-r.

By Mr. Herr:

Q. Where do you live?

A. 1461 Henry Avenue, DesPlaines, Illinois.

Q. What is your business, occupation or profession?

A. I am an engineer for the Lion Manufacturing Corporation and the Bally Manufacturing Company.

108 Q. How long have you been with that firm or with those firms?

A. Just short of 24 years. In January it will be 24 years.

Q. Are you acquainted with the three pin ball machines now in evidence in this proceedings?

A. Yes, sir.

Q. And are you acquainted with their mechanism and construction?

A. Yes, sir.

Q. Will you describe the machines, each of the machines separately?

By The Witness: May I step down, your Honor?

By The Court: Yes.

By Mr. Herr:

Q. Before you do that I would like to ask you one question: What are your duties in connection with your employment for these firms?

A. I do some design work, some consulting work, and also I teach mechanics and service men all over the country in operating and servicing of these machines, games.

Q. You are acquainted with the manner in which
109 they operate?

A. Yes.

Q. And how they are constructed?

A. Yes, sir.

Q. Now, will you please describe to the Court, using the machines so far as is necessary, the mechanism, construction and operation of these machines.

By The Court: I think I will have to ask you to recess at this time until 2:00 o'clock.

May I ask how much time you expect to take?

By Mr. Herr: I have just this witness.

By The Court: I know, but I don't know whether that is an hour or two hours or what.

By Mr. Herr: I shouldn't imagine more than half an hour.

By The Witness: It depends on what detail you want. In service school it takes a couple of hours.

By Mr. Barnett: How long?

By Mr. Herr: I don't propose to go into that.

110 By The Court: How long do you gentlemen expect to argue?

By Mr. Herr: If the Court would permit me, I would like to submit a written memorandum and brief.

By The Court: How much time do you want?

By Mr. Herr: Ten days.

By The Court: Very well. File a brief.

2:00 o'clock.

(Whereupon a recess was taken in the above-entitled cause to 2:00 o'clock p.m. of the same day, Tuesday, October 25, 1955.)

111

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 55 CR 486) * *

Chicago, Illinois,
Tuesday, October 25, 1955,
2:00 o'clock p.m.

Court convened pursuant to recess.

Present:

Mr. Barnett

Mr. Herr

And thereupon the following further proceedings were had herein:—

By The Clerk: Case on trial, 55 CR 486, United States vs. Korpan.

By The Court: Proceed.

ROBERT H. BREITHER, called as a witness on behalf of the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

112 *Direct Examination (Ctd.)*

By Mr. Herr:

By Mr. Herr: I will withdraw the question I asked just before adjournment at noon.

By Mr. Herr:

Q. I believe I forgot to ask you this preliminary-wise. Does the Lion Manufacturing Company or the Bally Manufacturing Company manufacture machines known as Bally Gaiety, Bally Hi-Fi, and Bally Variety?

A. They did.

Q. And the exhibits in evidence, Government's Exhibits 3, 4 and 5 being Bally Hi-Fi, Gaiety and Variety machines, who were those manufactured by?

A. Bally Manufacturing Company.

Q. And that is the manufacturer you are associated with?

A. Yes.

Q. You are acquainted with the operation of that machine?

A. Yes.

Q. Will you explain in detail the construction and operation of that machine?

113 By The Witness: May I have the Court's permission to step down there?

By The Court: Yes.

By Mr. Herr:

Q. Take the Exhibit 3 for example.

A. These games are essentially the same. They are equipped with and constructed with 25 holes in the play board. A complete game would be five balls shot out on the play field and pocketed at some position in the play board.

The scoring involved is a sequence type scoring in this respect, that to score replays you must shoot or light a series of three numbers in a vertical, horizontal or diagonal

line. For instance, by insertion of a coin a player conditions the game for play. Automatically the ball is brought up before the ball shooter. The player shoots this ball by the use of the ball shooter, or what we call in the trade a ball shooter.

Its construction features are such that we have designed the knob of the shooter with a very small amount of friction surface for the fingers so as to give a maximum amount of sensitivity to releasing the plunger. The 114 end of the plunger is equipped with a rubber rebound tip. This same plunger is nestled inside a ball guide plate which is calibrated with six or seven scored lines which allow the player to gauge the intensity of his shots. The purpose of that, of course, would be that if the player needs any particular hole on the right side of the field, depending upon the style of play he uses, he will either roll the ball right directly out of the gate onto the play field and come onto the right side, or he will shoot directly into the gate with the rebound with just enough force to miss the gate on the return shot and come down the right side. The same, of course, would be true in reverse procedure if he wants to come down the left side of the play field.

I said in scoring it is a sequence type scoring. Three or four lights in a row must be lit either horizontally, vertically, or diagonally. As he shoots one or two balls and they lodge in certain pockets, any one of the 25 pockets of the play field, he now has a pattern by which he will use his maximum skill. An example of that would be, for example, supporting the player lights number 9 and 115 shoots again and he lights number 12. Now, here again a player is definitely going to use his skill in gauging his shot because it calls for a number 2 to score replays. Definitely knowing anything about the game, he is not going to come down the right side; he is going to come down here to the left side to aim for the number 2 hole.

Now, he gauges his shots and he has this calibration to guide him. He also employs additional skills which he has developed and which have been incorporated into this game. We call it nudging. These legs which support the housing or cabinet are so constructed that there is give in the cabinet and it will allow the whole cabinet to hunch

forward, sideward or toward the player. He may do this either by pounding the left side or the front side or the right side of the front rail.

At the time a ball contacts any one of these posts—there are 35 to 45 posts equipped with rubber rings. If his shot comes in here and he needs to be off to the left or he has

to go off to the right he sometimes can nudge the ball
116 contacting the rubber ring. Therefore, he increases the rebound and either projects the ball over to the left or to the right. He cushions this rebound in reverse by contracting on the cabinet in this manner (indicating).

This game also has—well, one gentleman referred to it as a flipper. This game is equipped to allow the player to use the whole play field as nudging surface. I believe it was mentioned that flipper buttons are used. The same buttons on this game allow the board to shift forward at the time you want the ball to rebound either to the right or left.

Q. There are buttons on both sides?

A. On either the right or left side. Both operate. The whole body will move forward.

By Mr. Barnett: I want to be sure the record shows the witness is referring to Government's Exhibit 3 rather than Government's Exhibits 4 or 5.

By Mr. Herr: I think that is what the witness said he was speaking of.

By Mr. Herr:

Q. Will you proceed, please?

117 A. In other words, we have established that the ball shooter, that its construction is such that it will aid the player to use the maximum amount of skill. It has the calibration. It has the jumbo flipper which can propel the play field forward. It has the rubber rebound posts which are used in conjunction with this nudging either to the right or left. For a faster ball rolling down the play field the reverse is now employed, where they pull the game toward them and cushion the rebound.

The scoring, as I mentioned, is the sequence type scoring. Three lights or more in a given line must be lit to score replays. All the skill features that I have mentioned here are employed by players all over the country where I have

had occasion to observe. I have also observed that the skill varies according to the part of the country. In some sections the payers are more skillful than others.

There are other game features on the back board, that are shown on the back board of this game. For example; a supercard is shown and that supercard is shown 118 on the righthand side of the back glass.

These are additional ways to score replays. The standard or primary way is three numbers in a given line, four numbers or five numbers in a given line. Three numbers rate a certain number of replays. Four numbers in line rate a certain number of replays, and five rate a certain number of replays.

Additional plays on here, of course, can bring in any particular game feature listed on the back glass, be it this game, that game, or Exhibit 5.

As far as skill is concerned I believe I have covered everything. If your Honor will just let me, I will check to see if I covered everything.

Also I omitted—this ties in with the nudging that I mentioned before. I mentioned the nudging in connection with getting a ball in any one of the 25 pockets. The play board is so equipped that at the lower right and lower left-hand corners of the play board there are two buttons which illuminate, and when a ball rolls over these buttons numbers 2, 5 and 8 are put onto the board automatically. Now, my reason for mentioning that again is that the nudging or hunching or bumping, or if you use this jumbo flipper feature or anything employing your skill, is to keep a ball, when it gets down to this area on the play field, either to the left or right to obtain 5, 2 and 8. In other words, that is the equivalent of dropping three balls in pockets numbers 2, 5 and 8.

Q. Will you explain the construction of the legs and what their purpose is?

A. As I mentioned before, naturally I think the Court realizes the supports for the game could be designed such that they are reasonably or practically 99 per cent rigid, but the legs are left in this manner or are designed or manufactured in this manner so we can get a maximum amount of sway in this cabinet when the player is using this nudging feature. I would like to call the Court's attention to the fact that all three of these games when examined will show wear marks on the right and lefthand sides of the

front rail, which is only the result of nudging because the ordinary player will assume and use that feature, and use it to his advantage.

Q. Can you nudge without tilting?

120 A. Yes, you can nudge without tilting.

Br. Mr. Herr: You may take the witness stand, Mr. Breither.

(Thereupon the witness returned to the witness stand.)

By Mr. Herr:

Q. You are acquainted with pin ball machines generally, aren't you?

A. Yes, sir.

Q. Are you acquainted with slot machines?

A. Yes.

Q. Will you tell us what is the intrinsic characteristics of a slot machine, or what are the intrinsic characteristics?

A. Playwise and mechanically?

Q. Yes.

A. In a slot machine it is a mechanism either totally mechanical or part mechanical which has three reels in it or drums. On these drums are maybe six, seven or eight symbols, depending on the type of slot machine. The purpose and use of the slot machine is to insert a coin, pull a handle—and to what degree the handle is pulled has no factor at all—to spin the reels. The reels will spin
121 and locate one at a time, the first one, the second one and then the third one. At any time that symbols as set up on the machine and printed thereon are symbols of two of a kind or three of a kind lined up opposite the opening or glass portion at the front end of the game, cash is returned automatically out of this machine to the tune of anything from five to twenty.

Q. Has the player any part in controlling the mechanism or operation of that machine?

A. Absolutely not, none whatsoever.

Q. In the operation of a pin ball machine has the player a part in its operation?

A. Yes, he definitely has because, as I mentioned before, part of my duties are to travel around the country and instruct men in how to read circuits because of the complexity of the circuits; but at the same time my duties require observing players all over the country and it is a known fact that players vary in their proficiency.

For example, just to make it short, if one person in this room were given X numbers of coins to play the 122 game, anyone of these exhibits, and another person were given the same amount of coins to play the game the result would be different each time until one player develops sufficient skill to catch up to the better player.

By Mr. Herr: You may inquire of the witness.

Cross Examination.

By Mr. Barnett:

Q. How long have you been employed by the Bally Manufacturing Company, Mr. Breither?

A. It will be 24 years in January.

Q. During that time did the Bally Manufacturing Company ever manufacture any equipment which has since been banned from shipment in interstate commerce as gambling equipment?

By Mr. Herr: That is objected to, your Honor.

By The Court: Sustained.

By Mr. Barnett:

Q. During the course of your employment by the Bally Manufacturing Company you have been acquainted, have you not, with the intricate details of the manufacture 123 of what commonly are called one-arm bandits?

A. Fairly well so, yes, sir.

Q. You have described the manner in which a slot machine, as counsel has called it, is operated by the pulling down of a lever. Is that what is called the one-arm bandit?

A. Yes, sir.

Q. The reels on that slot machine present the winning or losing combination by the operation of chance, do they not?

A. Would you repeat that, please?

Q. The reels that spin on the slot machine or the one-arm bandit type machine present a winning or losing combination by operation of the element of chance, do they not?

A. By the stopping of it, yes, sir.

Q. Will you step down here and look at Government's Exhibit 5: look at the back board: and tell us the name of this unit that I have my finger on.

A. Mixing and spotting unit.

Q. That is called the mixer and spotting unit?

A. Yes.

Q. Is there something called the spinner unit on the machine?

124 A. Not as we term it. There is nothing labeled in here as a spinner unit.

Q. Do you know what I mean when I use the term spinner?

A. I have a hunch you may mean the search index.

Q. I may mean the search index?

A. I am not sure.

Q. What is the reflex unit on the machine? Where is that located?

A. That is the reflex unit down here (Indicating).

Q. What is the purpose of the reflex unit?

A. Well, we have found—and this is again field research, you can put it under that heading—that at no time have we been successful in marketing our games and having them appear to be interesting enough to players for a sustained length of time unless we used this unit.

Q. Is it possible to tell us the purpose of the unit?

A. I am going right into it. As you see this back board again, as I mentioned before—

Q. Now you are pointing to Government's Exhibit 4.

125 A. Yes. As you see this back board it has various game features on it. It has more than one game feature on it. In other words, to make it interesting to the player we use the reflex unit to vary this condition. Electrical and mechanical units are not perfect and they can go into what we call cycling in the trade, as anyone in the mechanical business knows. When cycling occurs—let's for purposes of illustration say it favors this side, these game features. With the reflex unit it will vary it around so the player gets the benefit of everything we claim on here. He score replays on any kind of game shown on here. That is a short explanation of it, but it can be proven.

Q. After a player makes several large winners does the reflex unit automatically reduce the chances of a winner playing winning numbers in the next sequence of chance?

A. In one game?

Q. No. Say the player has won a series of games, that the register on the back board shows a hundred games. Will the reflex unit reduce the opportunity of the player to win succeeding games?

126 A. It may shift. It won't reduce it. It will shift it, repropotion it.

Q. Isn't it a fact that it will eliminate certain winning combinations by the number of games that appear on the register, above?

A. I am afraid that I can't admit that. That is not a fact.

Q. It is not a fact?

A. No, sir.

Q. What does the reflex unit do with respect to reducing the opportunity to win?

A. With relation to game score?

Q. Yes.

● A. I mentioned if—for example, let's make it the direct play winner of 16 replays. At the time 16 replays are being scored over here, on the register over here, the reflex unit is operating the same number of steps. In other words with the number of 16 scores, 16 is the number of steps that the reflex unit is operated. It has now moved very slowly, but if sufficient number of replays were scored it would begin to shift from this feature and favor that, and add this. It just scrambles it around; it just re-
127 proportions, but there is not a total cut-out or reduction in the machine.

Q. You say it scrambles, but it does not prevent those combinations from coming up?

A. Prevent?

Q. Yes.

A. No, sir.

Q. What is the meaning of shifting the field of play to the other side?

A. Well, let's reword it. You play 100 games. You have 100 games up here. You walk up here and you play those games. All the while you are playing the game this unit is either moving, for purpose of explanation, to the left or to the right. If it is moving to the left it is giving you the amount of everything that you have here, the maximum amount of everything you have on this back board. As it moves to the right it may take, for purposes of explanation again, it may take two per cent off of here and put it down here or here; but at no time is there a total reduction. It is just a shifting.

Q. It is not a total reduction, but it does limit the 128 field of opportunity for you, does it not?

A. It changes your opportunity. It shifts it from one game feature to another game feature.

Q. In the design and engineering of these games are provisions made to tighten up the payoff percentage at the discretion of the operator or owner?

A. I don't believe I follow you on "pay-off" percentage."

Q. By pay-off procedure I mean the opportunity for winning.

A. Scoring replays?

Q. Scoring replays.

A. Would you word that once more?

Q. In the design and engineering of these games are provisions made to tighten up the payoff percentage at the discretion of the operator or owner or manufacturer?

A. Only if he actually disassembles something which he didn't mean to be disassembled. I am answering that because I heard some other gentleman testify here before, which was in error. He may not have had the opportunity to acquaint himself with it, but you would have to disassemble it.

129 Q. Let me indicate an item on the back board of this games, which says "Extra balls—L. M." and "C." What is the meaning of that?

A. Of the letters?

Q. What is the meaning of "Extra balls" as it appears on the back?

A.. The games is five balls, as I mentioned before. The extra ball feature is—I don't know what you call it—but it is a deluxe attachment to the game which is not necessarily used all over the country. Where territories cannot operate games with the extra ball feature they will disconnect it. That is what I mean by disassemble.

Q. This machine does have the extra ball feature, does it not?

A. Yes, all three do.

Q. Government's Exhibit 5 has the extra ball unit?

A. Yes, sir.

Q. Then, on this card which is inserted in the machine there are the letters "L, M and C". What do those letters refer to?

A. You can reduce the extra balls.

Q. What do the letters refer to? What words do 130 those letters represent?

A. It is merely a code. I will explain. This is probably what you are driving at.

If I have this in this position as I am showing here, the extra balls would be more predominant than if I had it over here.

Q. What words do the letters L, M and C represent?

A. No words at all.

Q. They don't mean liberal, moderate and conservative, or liberal, medium and conservative?

A. Let me put it this way. It is probably embarrassing me to answer. You want me to come up with an explanation for those words, but I write the manual and I don't believe you will find any printed matter anywhere that would indicate that. It is a three-stage circuit.

Q. How did you happen to pick those letters to indicate your three-stage progress? Does the letter "L" refer to a greater number of free balls or extra balls, or the lesser number of extra balls?

A. It is the maximum.

Q. What does the letter "C" refer to?

A. Well, it would be the minimum.

131 Q. How about the letter "M"?

A. Between the two.

Q. There is another card on here that says "corners". Can you show us on the face of the machine what corners are referred to?

A. This would be the corner play, which are right here, which scores 200 replays when lit. If this panel lights and I go in pockets numbers 9, 6, 3 and 11 I have showed a corners replay winner.

Q. The letters L, M and C opposite the corners which are in conjunction with the electrical device here?

A. The connector plug.

Q. Connector plug?

A. Yes.

Q. What is the meaning of the letter L with respect to that connector plug?

A. I think that will go together on the same basis there.

Q. A maximum number of corner plays or corner play opportunities?

A. Yes, opportunities, yes.

Q. The "M" stands for the medium number?

132 A. Yes.

Q. And the "C" stands for a minimum number?

A. Yes.

Q. You demonstrated you could pull it out and put it back in again with reasonable facility. Is that true also of the corner connector plug? Can that be adjusted with ease?

A. Yes, oh, yes.

Q. Can it be adjusted by the owner and operator of the machine without it going back to the factory and without it being disassembled?

A. I maybe used the word loosely. If you disconnect you shut it off. If you move it back one position you have changed the extra ball frequency and moved it over somewhere else.

Q. You changed the extra ball frequency for us now. Let us, say, make it maximum.

A. Let's go to maximum there.

Q. As to the opportunity of getting those extra balls as far as the player is concerned, what control does he have over getting the extra balls?

A. Well, the player must insert coins or play off replays with the red button.

Q. If he inserts coins does he get an extra ball.
133 at all times?

A. No, not at all times.

Q. When he inserts that coin does he have any way of determining in advance where he is going to get an extra ball?

A. He buys it to a degree, I believe, when he spends a replay. He may advance and illuminate one light or two lights.

Q. Would you say before that, when he puts in the dime does he know what is going to happen there with reference to extra balls?

A. Not every time, no.

Q. Does he know at any time?

A. After he has obtained one light first or the extra light he has an indication he now is closer.

Q. In other words, he is being induced to put in another dime and he may get another ball at that point?

A. It is advertising, yes, sir.

Q. Isn't it a fact that the opportunity for his getting that extra ball is all pre-set in advance for him on that device marked "Extra balls" on the machine over which 134 the player has no control whatsoever?

A. When you say "pre-set" do you mean at a given time?

Q. At any time.

A. At a given time the game will automatically give a ball and illuminate the first extra ball.

Q. My question is: With relation to the player himself when he puts a dime in the machine, does he have an opportunity to control the action of that machine, that is, so far as to whether it is going to give him an extra ball or not?

A. No.

Q. It is determined for him by the machine itself, is it not?

A. That is right.

Q. By the setting of a machine?

A. No settings, no, not settings.

Q. No?

A. No.

Q. By what?

A. Well, we spoke of this mixer.

Q. The extra balls, isn't that determined by this locator?

A. That is a phase of the circuit. You understand, when you condition a game for a play or for an extra ball pay the unit must operate, and a predetermined circuit is in here to average out the frequency of that extra ball light or any other given feature. He can't wind up with with 100 per cent cash going in and 100 per cent rescues. There is no revenue in there. They would be playing it all day.

Q. What do you call that operation?

A. Mixer and spotting.

Q. Spotter?

A. Spotting.

Q. Is that a continuous relay?

A. No, it is a rotary unit. We call it a rotary unit.

Q. What is the purpose of that unit?

A. Well, something has to signal the various game features to come on in the back glass so the player knows how many game advantages he may shoot for. That unit, in short, will automatically allow these game features to illuminate, light up.

Q. That will automatically allow those game features to illuminate?

136 A. Yes.

Q. When the player places a dime in the machine does this mechanism rotate or does it start operating at that point?

A. Yes, sir.

Q. And then it selects certain odds for the player, does it?

A. The score indication here, yes.

Q. Does it do anything else besides selecting the odds?

A. It shows the scores. It shows any game feature shown on the back glass depending on which particular game we are referring to.

Q. When another dime is put in will it do anything else?

A. It will operate and prorated.

Q. To increase, perhaps, the scores?

A. It may add game features. It may increase scores.

Q. By "game feature" you are referring to what?

A. In this case it would be "corners", "super-card", "magic lines," "stars" red and yellow stars.

Q. Those are all opportunities that the player gets from time to time as he put dimes in the slot, is that
137 correct?

A. Of course, the game is conditioned for a full, complete game with the insertion of one coin or one replay with additional game features.

Q. So that extra game features come incidental to the insertion of the first coin?

A. Two-thirds may come up on the insertion of the first coin.

Q. They may or may not?

A. They may or may not.

Q. By insertion of additional coins the odds may or may not increase and other game features may or may not show up, is that correct?

A. That is correct.

Q. The player has no control over whether the odds increase or additional game features show up, has he? All he does is put his dime in?

A. The insertion of dimes or replays.

Q. This rotary unit here does that operate by the pre-determined setting, or what is the causitive factor that makes it operate to cause the additional games or additional game features or odds to light up?

138 A. A 180 degree rotation of one cam in there will release this for that period of time.

Q. What does that mean?

A. Well, the motor is operating. Each of these contact plates are equipped with their own indexing arm. None of them can rotate with the motor operating and none of these release arms is energized. So when the game is conditioned for play this unit operates. The timing cam assembly, as you can call it, rotates 180 degrees. One set of points will release this and allow this to rotate for the on period of the 180 degrees over here.

Q. That is a setting that is determined in advance, is that right?

A. Well, you are talking about this 180 degrees now?

Q. Yes.

A. Yes, it is. The cam is cut to rotate and keep it energized for X number of degrees.

Q. This rotary machine when it is going around may or may not cause additional odds to appear on the machine, additional game features to appear, and it does that insofar as the player is concerned by presenting to him additional winning possibilities. It may or may not present additional winning possibilities to him, is that right?

A. Yes.

Q. As far as the player is concerned it is a matter of chance, is it not?

A. I guess you could say it would be chance.

Q. As a matter of fact, is there any essential difference as far as the player is concerned between the operation of this device and the operation of the wheels on the one-arm bandit slot machine?

A. Yes, because of no opportunity to benefit from what you have purchased. It is strictly a matter of rotating wheels against a scrambled time element?

Q. These are the electrical—

A. Can I finish?

Q. Excuse me.

A. That is the slot machine operation. This explanation is only one part of the game. The game itself is propelling the balls out on the play field and using the game features you have purchased. Nothing is purchased in 140 the slot machine.

Q. Is it not a fact that this selecting device, to the extent that it operates with the same degree of chance or maybe even less degree of chance but with no degree of skill, is the same as the slot machine, the one-arm bandit type of slot machine?

A. I can only agree to this extent, that the two units could be related mechanically and functionwise, but this unit as it is used is entirely different than the unit you speak of in a slot machine because there once the reel is spun and stops, it is over.

Q. You are going beyond me. In the slot machine, the one-arm bandit type, the reels spin around and they determine the odds, do they not, that the player receives by the way of the bells and plums that come up?

A. The intensity of winning of cash rewards.

Q. That is odds, isn't it?

A. They determine that by mechanical means.

Q. Those reels operate by inertia, do they not?

A. No, they are spring loaded.

141 Q. Once the springs stop the reels go forward. It shoots them into action and they keep rolling until inertia stops them?

A. Then index arms will release and stop the reels, one, two, three.

Q. Doesn't this rotary device operate on a similar principle as the electronic advancing of those spinning reels in the slot machine?

A. Without the wires connected to this unit I would say the two units are similar, yes.

Q. Without the wires?

A. Yes.

Q. Now, the player himself has no control, does he, over the mechanism in the machine which determines whether or not he is to receive the greater opportunities upon the insertion of an additional coin?

A. No.

Q. The player has no control over the rotary device, does he?

A. No, sir.

Q. You testified that you had traveled over the country and that you had had the opportunity of seeing people play these games with greater or lesser degrees of skill.

142 Incidentally, are you a skilled player yourself?

A. Twenty years ago, yes, but not today.

Q. I suppose that the first ball that is shot by a skilled player goes any place as far as he is concerned?

A. There again I would say no, not with the real proficient player.

Q. He knows where he wants the ball?

A. He has a fairly good idea. He has played the game. If he never played the game, your question is correct. If he played the game before, he is now exercising skill and judgment, too, because he has realized that certain lines are more favored than others for the simple reason that the skill with which he may shoot into the vertical line—I am pointing to the right now—will score more often than any other line shown on the card.

Q. Isn't that controlled by this reflex mechanism?

A. It has nothing to do with it. It is strictly the player.

Q. Doesn't the reflex mechanism tell whether or not the winning numbers will be selected?

143 A. Oh, please, no, no. This card has nothing to do with the mechanism. What you shoot, the skill with which you play, you benefit from that on this card. There is nothing in the mechanism that is related to this except it takes six volts to light this light, nothing else. It takes a circuit to register the free balls. There is no relation with any unit other than that.

Q. The reflex unit is related to what?

A. To game features.

Q. And to odds?

A. Yes, sir, the scores show here.

Q. Now, you say that on one side of the machine it is easier to get the balls in than on the other.

A. I say this particular line has become a favorite amongst people who are more skillful and they will immediately on the first ball attempt to shoot for any one of these numbers.

Q. So they have got to get two more numbers in line to get a winner?

A. Yes, sir.

Q. After a long series of play and after obtaining the highest degree of skill in using this plunger mechanism 144 and also in bumping the machine, it is possible to shoot the ball and bump the machine in such manner as to play the ball in the same hole ninety-nine times out of a hundred?

A. I don't think so, no, no more than I could bowl a 300 game ninety-nine times out of a hundred.

Q. Is it possible for a skillful player to place the ball in the same hole fifty times out of a hundred?

A. Of course, we never made any actual calculations on it. Our figures that we have available show us that skillful players will score a fair amount of more replays than new player or less skillful player.

Q. You cannot state that a skillful player could get the ball in the same hole fifty times out of a hundred?

A. The only thing I—

Q. Can you state that or not?

A. No, I wouldn't say that.

Q. Can you state that a skillful player could get the ball in the same hole five times out of a hundred?

A. Yes.

Q. Yes?

145 A. Yes.

Q. Could you do that?

A. I am not a skillful player.

Q. Do you have a skillful player available who can do it for us?

A. I don't think so.

Q. In a game of skill all players have the same opportunity insofar as the device is concerned to win the same proportion, do they not? In bowling, each player has the same opportunity. He has the same ball; the same pins;

the same alley; and whether he loses or wins the game depends upon his own dexterity in propelling the ball down the alley?

A. Yes.

Q. The winnings that the individual players make on these machines are entirely dependent on the mechanism within the machine and on the money they play in the machine, are they not?

A. The total number of replays scored over a given period of time will always be the same. Do I make myself clear?

Q. For the same odds?

146 A. I don't care about anything. The total replays scored would always be the same in a reasonable given time. If you and I play five minutes you would be correct; but it can average itself out. Whether you were skillful or not skillful the game will score a total number of replays which are always fairly constant. The figure is always constant.

Q. When you step up to the machine and put a dime in to start playing you may have one set of odds or another set; you may have game features?

A. Yes.

Q. Each time you play the machine, whether you have the odds of 96, 16 and 14, or 96, 20 and 6, those things are determined by the machine rather than by your skill in the operation of the machine, is that right?

A. The indication of those, yes, but over--

Q. If you win it is determined by the odds that would pay off on that basis?

A. They register whatever group is illuminated.

Q. Depending on the odds which are set up by the machine itself?

A. Well, something has to indicate it.

147 Q. But at any rate, the player doesn't have control over that?

A. No, only additional plays; that is all.

Q. He hasn't any control over it?

A. He has control over scoring. The scoring would be the play field and the card.

Q. What controls that?

A. The skill controls how frequently three-in-line scores occur.

Q. What is the skill exercised?

A. Through the use, as I mentioned, of the ball shooter and the guide plate, the nudging, and in this game, jumbo flippers and the legs. You notice these wear marks? I mentioned that before. That is definitely from that. That is what it is from.

Q. You say the wear came from nudging. You don't know whether or not that wear would come from leaning on the machine, do you?

A. The best answer there would be, of course, that it seems peculiar no matter which particular game you look at, they all have the same wear marks. In other words, it indicates the habits of the people playing are the same, and they are not leaning on the game or resting on it. They are playing it like this, and like that.

148 Q. When the ball is released by this plunger and the ball comes up to the first line of pockets, does the player have any control over the operation of that ball beyond the first line of pockets?

A. Yes, as I mentioned, he will then use this nudging to the fullest degree. For example, if he needed number 11 hole, which is approximately in the center of the play board, and he is over here at a post just slightly to the left of number 8 he then can propel that ball by nudging it over toward the 11.

Q. We are looking at Government's Exhibit 4. Will you play that machine and will you nudge that machine to move the ball into the hole?

A. (The witness operated the machine.)

I am not a skillful player.

Q. I notice the machine tilted when you nudged it.

A. Yes, it is not set properly.

Q. It is not set properly?

A. No.

Q. Should it be set so that it doesn't tilt?

A. The tilt device is only a means for preventing vandalism. As far as the nudging occurs, we want
149 that. The operator of the machine wants that. It is more attractive to the player because he can employ additional skill.

Q. How much of a tilt is put on the machine whenever you hit it?

A. I said this particular machine is not adjusted. It is out of adjustment. That is not a fair comparison. Another thing, the game isn't level. The regular adjustments aren't on. They are not adjusted.

Q. Now we have Government's Exhibit No. 5. Do you know how to activate the lever? Will you operate the ball for us?

A. Bear with me a minute. I am not skillful.

Q. You are just as skillful as I am, I am sure. Will you nudge the machine?

A. Give me another try.

Q. All right.

A. I can tilt it where it belongs. In fact, you have a cable laying on the tilt bar here.

Q. The tilt can be adjusted?

A. It is meant to be adjusted because of the slower conditions and locations. There has to be some device.
150 It is a protection against vandalism. If anyone attempts to pick up this game and manhandle it, he is damaging valuable property.

I can't attempt to play under those conditions. You can see the reason.

Q. Isn't it a fact that the tilt device is such that it prevents you from exercising a great degree of skill over the machine?

A. No, sir, you are very, very wrong on that.

Q. Now, with reference to Government's Exhibit 3, you indicated that there was something that you called a jumbo flipper.

A. I just thought of that name now because the other gentleman called it a flipper.

Q. I don't believe the gentleman testified as to that device.

A. No, it is just that it performs the same function.

Q. Will you show us on that?

A. (The witness operated the machine.)

Q. Now you have activated Government's Exhibit No. 3. How many dimes have you put in there so far?

A. The game is not working. I mean, the "bump"
151 is out. You get them right away.

Q. How many dimes have you put in there so far?

A. I don't know. I can't testify on the game until I am sure it is operating. It is not operating.

Q. You mean the "bumps"?

A. The owner would know if it is cut off or out of order. I wouldn't know.

Q. Will you examine Government's Exhibits 4 and 5 and see if those "bumps" devices are present on those machines.

A. These are other models and they don't have it.

Q. Only Government's Exhibit No. 3 has the "bump" device?

A. Yes.

Q. Will you explain to us how the "bump" device operates when it does operate on the machine.

A. The whole playing field floats—not floats but is fastened to rollers. The play field roughly is capable of moving three-eighths of an inch under activated electromatic action. In other words, it would be the same as if I do this.

Q. Hitting it hard?

152 A. The actuation of the buttons will perform the same function and shift the board forward and return in a fraction of a second.

Q. When do you have occasion to do that?

A. When this is lit.

Q. You mean in relation to the ball rolling down the field?

A. You have access to it and use it as you see fit, but the big advantage is, of course, when you are on the left side of the play field and you want to go to the right side of the play field. As soon as you contact a rubber post, you actuate the button.

Q. Which makes the whole field move?

A. I would make it maybe two, three bumps will work it from the left side to the right side from the actuation of the button and the play field going forward will bring the ball to you, back to the number 8 which, say, you needed. You hit it and she went back to 8.

Q. Isn't that opportunity for bumping a game feature?

A. Yes.

Q. Obviously, it didn't light up when you started
153 this operation.

A. It should come on with the first coin.

Q. It should always come on with the first coin?

A. Yes.

Q. I see there is a series of numbers with the word "number"? Does that mean the number of additional bumps which you can obtain?

A. Additional bumps which you obtain by additional play. The additional coin or replays is what I mean. In other words, the first coin will give you four and additional plays will increase it six, seven, eight, nine, ten.

Q. It may or may not, isn't that right?

A. From four on.

Q. It may or may not give you the first four?

A. You should get the first four with the first coin.

Q. You mean when you put in your first dime it should always give you the first bump?

A. The first four bumps.

Q. And if it doesn't go on?

A. It goes on if it is operating properly.

Q. This machine was operating properly and there was nothing wrong and there was nothing done to it
154 according to the testimony of the people that owned it.

A. The testimony of whom?

Q. The testimony of the people that owned it.

A. I didn't examine it. I wouldn't be the one in the room that would know. I would want to examine it.

Q. Incidentally, how much money can a player put in one of these machines before he plays a single game? Is there any stop to the number of dimes he can put in to increase the odds?

A. It is only common sense once all game features are lit that he would definitely stop. There is no incentive beyond that to play any more.

Q. What is the maximum amount of money that the machine will hold? How many dimes will go in one of those things?

A. You mean in the box?

Q. Yes, how much would it take?

A. Well, you are on a subject that is out of my line. I don't worry about that. The mechanical, electrical and the play features is my job. I can give you a guess, but I don't think I would be very accurate.

155 By The Court: What is the object of the game?

By The Witness: I beg your pardon, your Honor?

By The Court: What is the object of the game other than to test your skill?

By The Witness: Well, the object is to score replays so that you may play.

By The Court: What is a replay? Is that just another play?

By The Witness: Yes.

By The Court: I say, what is the ultimate object of the game other than just to test some skill?

By The Witness: Your Honor, if you will allow me to answer this way; all I can say is that people who play these games definitely derive a tremendous amount of amusement from it. They do, professional men, laborers, people in all walks of life. I have asked. I tried that at different times when we were ready to come out with a new model.

156 By The Court: Where does the ecstasy come in?

By The Witness: Trying to score a lot of replays, I guess.

By The Court: If you get a hundred replays what do you do with them?

By The Witness: Play them back.

By The Court: You play on?

By The Witness: I think it is to be able to brag, "Look what I did." In other words, in a high score type game I could say, "I made 1,000,000." Over here on this game, I could say, "Oh, boy, I ran this up to 182 plays. Just you beat that, Joe." It is a quirk of human beings. I don't know.

By Mr. Barnett:

Q. Do you know what the replay meter is?

A. Yes.

Q. Would you point that out to us?

A. Here it is.

Q. It is on the side; and on Exhibit No. 5 it now registers 2891.

Isn't there something called the knock-off button 157 on that machine?

A. That button under the cabinet here which would be used—well, for example, as I mentioned, I had 182 free games and my wife is anxious to have me home and I

don't want to play them off now. I tell the merchant, of course, that I am going. Naturally, he is not going to stand there and play them off one at a time. He then uses that button and that will restore the register to zero and will indicate on here.

Q. It will indicate on here what?

A. Whatever I had registered up there.

Q. If it was a hundred games it would add one hundred games to the replay meter down here?

A. Yes.

Q. What is the purpose of that?

A. Well, you see, for forty-eight states and the territory of Alaska, in other words, to come up with something that wouldn't require special games for various types of territories where they can use that, we make all games in this manner.

Now, it is also used in territories where, well, redeeming games are supposed to be illegal. We will use it for a convenience, as I just gave you an example. We will use it as a convenience. In other words, let me put it another way.

Q. The fact is the proprietor will pay off a dime per play, as that is the purpose of replays?

A. Will you repeat that?

Q. Isn't that replay meter there so that the owner or collector when he comes around to the machine in the tavern or wherever the machine is operating will be able to allow him an adjustment out of proceeds in the box according to the replay meter?

A. If he made some redemptions for some reason for unused games, I agree.

Q. But that is the purpose?

A. It is a means for bookkeeping. It is an accounting. You have to have some accounting.

Q. You don't have to have it unless there is money involved, do you?

A. You would, if I went home and you said, "Well, come back and take care of it tomorrow. Here are sixteen coins you got coming." I then run off home. After work I may stop by and play your sixteen coins or the 160 coins, or whatever it was.

159 Q. How long has this machine been on the market?

A. You mean this type or this particular machine?

Q. This particular machine.

A. It runs around three months.

Q. Three months?

A. Yes.

Q. It has been on the market three months?

A. It was on the market three months, this particular machine.

Q. What is the generic term for this machine or game?

A. In-line games.

Q. In-line games?

A. Yes.

Q. That refers to winning numbers in line; is that the reference?

A. Scoring three in line, four in line, five in line.

Q. Are they also called bingo machines?

A. I have heard that, yes.

Q. Are they also called keno machines in Boston?

A. In Boston it is beano.

Q. How long have these machines, the bingo machines, been on the market or the in-line machine? How long
160 have you been manufacturing in-line machines?

A. I think it is the latter part of 1950 or the first part of 1951, if my memory is right. It is approximately that. I am close, within four or five months, anyway.

By Mr. Barnett: I have no further questions.

By Mr. Herr: I have none, your Honor.

(Witness excused.)

By Mr. Herr: If the Court please, at this time I desire to offer in evidence the exhibits identified by Mrs. Vollner this morning and which happened by chance to be marked Exhibits 7 and 8. I would like to have those received in evidence as Defendant's Exhibits 1 and 2.

By The Court: Is there any objection?

By Mr. Herr: Mrs. Vollner identified both instruments.

By Mr. Barnett: These are photostatic copies, are they?

By Mr. Herr: Yes, sir. Mrs. Vollner said they are the forms used.

161 By Mr. Barnett: No objection.

By The Court: They may be received.

(Said documents, so offered and received in evidence, were marked Defendant's Exhibits 1 and 2.)

By Mr. Herr: I would like to offer in evidence, too, if the Court pleases, the receipt given Walter Korpan for the three devices when paying the special tax with respect to the three machines in evidence, but I will ask for leave to withdraw. Defendant's Exhibit 3 is the receipt number 3197501 issued by the Government and bearing the signature of collection officer Frank Evangelista. Defendant's Exhibit 4 is the receipt issued by the Department of Internal Revenue bearing number 207135 and issued to Walter Korpan, Korpan's Landing, Fox Lake, Illinois, and indicating that the license expires June 30, 1956, the amount paid being \$825.00 and which a witness for the Government testified included \$750.00 as taxes and 162 \$75.00 as penalty. I will ask for leave, if I may, to withdraw this tax receipt or whatever it may be called and substitute either a photostatic copy or a typewritten copy therefor.

By The Court: Is there any objection to the offers?

By Mr. Barnett: May I see those, please?

I have no objection.

By The Court: They may be received.

(Said documents, so offered and received in evidence, were marked Defendant's Exhibits 3 and 4.)

By Mr. Herr: I desire to offer in evidence as Defendant's Exhibit 5 the Revenue Act of 1941 and the bills in their various forms as introduced in committee, in this instance being page 74 of Volume 27 of bills in their various forms as prepared for the Congressional Committee and Congressional Record and I will ask for leave to substitute in place of the volume.

By The Court: It isn't proper to be offered in evidence.

163 By Mr. Herr: I thought that was probably the way I would have to do it. I recognize the Court takes judicial notice of it.

By The Court: You may file it with your written brief.

By Mr. Herr: May I also file with the brief letters and communications between the Internal Revenue Department, the Treasury Department and the Collector of In-

ternal Revenue, and from the Department of the Collector of Revenue to various inquiring agencies with respect to the application of the tax and their interpretations thereof?

By The Court: I am very much in doubt whether the agent of the Government can bind the Government in matters of that kind.

Is there any objection?

By Mr. Herr: I have submitted those, by the way, to Mr. Barnett.

By Mr. Barnett: I might say that the documents that he has here purport to be copies of original documents on file elsewhere. I have no means of determining the
164 validity of the documents, if they do mean anything, and I question their relevancy.

By The Court: Objection sustained. The law is the law and what Tom, Dick or Harry says it is doesn't make any difference.

By Mr. Herr: I recognize that, too, your Honor.

Then I will file with my brief, if I may, if the Court pleases, photostatic excerpts from those reports..

By The Court: Yes.

By Mr. Herr: I have supplied counsel with those photostats already.

By The Court: All right.

By Mr. Herr: With that we rest, your Honor.

An Thereupon The Defendant Rested His Case.

165 By Mr. Herr: I believe the proper procedure at this time should be a motion for acquittal at the close of all of the evidence, and I believe a brief to be submitted to the Court within ten days.

By The Court: Do you want to submit a brief?

By Mr. Barnett: I should like the opportunity of submitting a reply brief within five days following.

By The Court: Is that agreeable?

By Mr. Herr: Yes.

By The Court: Then the defendant will submit his brief within ten days. How long did you want?

By Mr. Barnett: Five days will be sufficient.

By The Court: The Government will submit a reply brief five days thereafter.

Would you want oral argument?

By Mr. Herr: I would like oral argument, if the Court please.

By The Court: I won't listen to you very long after I have read the briefs.

By Mr. Herr: I know the Court will review the briefs. May I put it this way? If the Court desires oral argument we will set it down.

166 By The Court: I will set it down.

By Mr. Herr: May I withdraw my exhibits to be included in the record, if necessary?

By The Court: Yes.

I will hear you briefly on the 21st day of November.

By Mr. Barnett: With the consent of counsel may we substitute photostatic copies of Government's Exhibits 1 and 2?

By Mr. Herr: Yes.

By The Court: Very well.

167

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

C E R T I F I C A T E

I hereby certify that the above and foregoing transcript comprising pages numbered consecutively from 1 to 156 is a full, true and accurate transcript of the original shorthand notes of all the proceedings had at the trial of the above-entitled cause on October 25, 1955, before the Honorable John P. Barnes, Chief Judge of said Court.

Roy E. Fuller

Roy E. Fuller

Official Court Reporter

United States District Court

Northern District of Illinois

October 28, 1955.

168

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, Chief Judge of said Court, in his court room in the United States Court House at Chicago, Illinois, on Thursday, December 8, 1955, at 10:00 o'clock a.m.

Appearances:

Hon. Robert Tieken, United States District Attorney,
by

William A. Barnett, Esq., Assistant United States District Attorney,

on behalf of the Government;

Simon Herr, Esq.,

on behalf of the Defendant.

168a And thereupon the following proceedings were had herein:

By The Clerk: No. 55 CR 486: United States of America vs. Walter Korpan.

Defendant's motion for a new trial.

By The Court: Proceed.

By Mr. Herr: Your Honor, after the matter was disposed of on Monday we held some conferences, as the result of which we believe that the matter should be reviewed in order to get some final determination on the question which has extensive implications.

The defendant is presently on bail in the amount of \$1,000.00. Your Honor fined him \$750.00.

I propose to carry through with the appeal with such dispatch as the situation will permit. And in view of the fact that there is \$1,000.00 bail in cash deposited with the Clerk of this Court I ask the Court to permit the defendant's enlargement on bail in that amount pending the appeal.

By The Court: Did you serve notice?

By Mr. Herr: Yes.

By The Court: What do you say?

By Mr. Barnett: We have no objection to that, your Honor.

169 By The Court: Make the order.

By Mr. Herr: Thank you.

By The Court: What about your motion for a new trial?

By Mr. Herr: I have filed a written motion for a new trial.

By The Court: That will be overruled.

By Mr. Herr: And motion in arrest of judgment.

By The Court: Overruled.

170

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

CERTIFICATE

I hereby certify that the above and foregoing transcript comprising pages numbered consecutively from 1 to 3 is a full, true and accurate transcript of my original shorthand notes of the proceedings had upon the hearing of the above matters in the above-entitled cause on December 8, 1955.

Roy E. Fuller

Roy E. Fuller

Official Court Reporter

United States District Court

Northern District of Illinois

December 12, 1955.

171

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, Chief Judge of said Court, in his court room in the United States Court House at Chicago, Illinois, on Monday, December 5, 1955, at 10:00 o'clock a.m.

Appearances:

Hon. Robert Ticken, United States District Attorney,
by

William A. Barnett, Esq., Assistant United States District Attorney,

on behalf of the Government;

Simon Herr, Esq.,

on behalf of the Defendant.

172 By Mr. Herr: Your Honor, I believe this is an argument on the defendant's motion for acquittal at the close of all of the evidence. I don't know, if the Court

please, if you have had time to read the briefs and memorandum.

By The Court: I have.

By Mr. Herr: Because that will, to some degree, limit the extent of the discussion, if your Honor has found the time to do it.

By The Court: I have, sir.

By Mr. Herr: May I commence by reviewing the nature of the action, it being an indictment charging the defendant with wilfully violating the particular statute referred to in the indictment, namely Sections 4462 of the Federal Code.

The question in this case, then, is whether the act under which the indictment was framed contemplates that there shall be a prosecution for failing to obtain a stamp in the amount of \$250.00 on a pin ball machine as against and distinguished from a slot machine.

The legislature or the legislation on the subject, your Honor, found its origin in the purpose to derive revenue from various activities and enterprises. In 1941 the 173 legislature, knowing undoubtedly what a pin ball machine was, and what a slot machine was, and how one was distinguishable from the other, knowing their vagaries and their elements, set up proposed legislation.

If your Honor will take the present Act and line it up alongside of—I believe it is Exhibit 6, your Honor—your Honor will note that while the Legislature or Congress started out with that purpose, when Congress started out its purpose was to define and distinguish between pin ball machines as a class and slot machines, pin ball machines were declared by Congress to be by their very language machines that afforded amusement. Congress did not say that they lacked an element of chance or that the dependency on whether or not the tax shall be imposed was the resolving of the question of whether or not the gambling feature was there involved. They recognized a distinction based upon economic factors, the economic factors being as follows:

The slot machine which is referred to in the history as the "one armed bandit" was a source of very substantial revenue to its operators. The pin ball machine did not enjoy such revenue and could not. Since the revenue wasn't available on the operation of the machine, there was a distinction made in their classification for the purposes of taxation.

In 1941 there was then passed an act which said:

"As used in this part, the term 'coin operated and gaming devices' means:

"1. So-called pin ball and other similar amusement machines operated by means of the insertion of a coin, token or similar object."

Your Honor will note, before I continue with the section there of that pin ball and other similar amusement machines operated by means of the insertion of a coin, it set up a certain class and type of machine. Undoubtedly Congress knew, and we must suppose that they did know what constituted a pin ball machine, how it was functioning, what its factors were, and what its involvements were in the common use thereof.

Then they set up another classification, they said:

175 "2. So-called 'slot' machines' which operate by means of the insertion of a coin, token or similar object and which, by means of the element of chance, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens."

Your Honor will note that pin ball machines are referred to as amusement machines. Your Honor will note that slot machines are referred to as machines which operate by the application of the element of chance solely. Had the word "wholly" been put in there, there would be no question about it. Its absence, however, is readily understandable in the context in which it is used because in one paragraph or sentence the term "pin ball" is used, whereas in the next sentence the word "slot machine" is distinctly referred to as a machine that is—the outcome of which is determined essentially and entirely by the element of chance.

It doesn't say in part by chance, it says, "by the element of chance."

In other words, "wholly by the element of chance."

176 Now, then, with respect to pin ball machines, like any other activity or endeavor of man, an element of chance will enter and the extent to which it enters may determine the result. However, when the legislation passed does not say "the result," but instead distinguishes one from the other by virtue of the inherent characteristics of the machines, you have a well defined purpose expressed in fixing the types of tax or the amounts of tax to be attached to each of the types.

When the matter came on for bearing and further consideration in '42 before the Congressional Committees, they again concerned themselves with the question of the amount of tax to be charged against each of these types of devices.

So in 1942 hearing were had.

Your Honor, in the memorandum and the exhibits submitted to you, we did not include one that I think has some importance and which was part of the Congressional hearings. That relates to the statement by one of the Congressmen, Mr. Eberharder, when he said:

"What we intended was to tax one armed bandits \$250.00,—nothing else."

Nothing else, just that.

The Congressmen knew, the Senators knew, everybody commonly knows how a pin ball machine is operated. Congress has said it supplies an amusement. Congress also recognized, and it will appear from the exhibits submitted, that the revenue on pin ball machines is entirely dissonant from and dissimilar from that derived from slot machines and that they couldn't stand the tax, that there has to be a distinction.

Now there has been no change materially in the law from that point forward up to the change in the amount of tax from \$250.00 for pin ball machines and \$10.00, to this, and it is a matter of language.

If your Honor will now have before you the present Act and the one first passed in 1941, your Honor will note that what had been done was to expand the area of amusement machines to include not only pin ball machines but other types. For example, in 1941 the clause read:

"As used in this part, the term 'coin operated amusement and gaming devices' means:

"1. So-called pin ball and other similar amusement machines operated by means of the insertion of a coin—"
and so forth.

178 When it was revised it was revised to read:

"Any amusement or music machine operated by means of the insertion of a coin—"

Why? Because the field was broadened. It did not then exclude pin ball machines but broadened the area of amusement machines not alone to be just pin ball machines but every other type of amusement machine wherein a slot was involved and the insertion of a coin involved.

Now with reference to the second part, the language is, I believe, identical, if your Honor will follow it, with respect to both the '41 Act and the latest one. Your Honor will note the language is identical.

"So-called slot machines which operate by means of the insertion of a coin, token or similar object, and which by application of the element of chance—" That means only by, solely by the element of chance—

"may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens."

The term does not include bona fide vending machines which are not incorporated with gaming or amusement features. In other words, a slot machine does not include gaming or other amusement features, or machines of that nature. It is limited solely to one type of machine, a slot machine.

When Congress defined the term "slot machine" in the Jefferson Act, they described it, and that was a machine having reels and drums upon which certain symbols appeared and which in combination resulted in a payout.

The term "slot machine", then, when used by Congress, means the common, every day accepted-type of machine.

Not alone, your Honor, was that the clear intention of Congress in the adoption of these regulations or provisions as appears from the legislative history which we have incorporated or submitted to the Court by way of exhibits, but it also appears, your Honor, in the understanding of the Act by the U. S. Treasury Department. If I may be permitted, I would like to read just two communications of which I have photostatic copies, your Honor, indicating that understanding.

There is one dated August 17, 1951, "Mr. Edward Blumenfield"—

May I go back a step? This letter is from the U. S. Treasury Department, office of Collector of Revenue, Post Office and Court House, Indianapolis 6, Indiana, Internal Revenue Service, District of Indiana.

"Mr. Edwin Blumenfield,
314 Wellard Avenue
Michigan City, Indiana

"Reference is made to your letter of August 15, 1951, stating that you are operating a machine referred to as "one ball." It does not have a slot paying money.

In case of a winning score, free games are awarded for winning scores. The player can refuse the free game or games and take cash. The cash is given by the operators of the establishment where the machine is placed.

"This is the arrangement between yourself and the proprietor of the establishment. There is nothing in the machine explaining this or anything else concerning a prize.

181 "You are advised in this connection the Commissioner of Internal Revenue has held that the machine must deliver to the person playing cash, tokens, premiums, or merchandise, or the machine must indicate to the person playing or operating the machine that he is entitled to receive cash, premiums, merchandise or tokens.

"In other words, the machine must have a legend inscribed thereon notifying the player what he is to receive. Private arrangements between the player and the proprietor would not bring the machine within the classification of a gaming device.

"From the information submitted, these machines would only be subject to the coin-operated amusement device special tax."

There is another letter, your Honor, and this letter is from the U. S. Treasury Department in Washington 25, D. C., Office of the Commissioner of Internal Revenue, addressed to Mr. Roy Barnett. I understand this Mr. Barnett is a relative of the Assistant District Attorney prosecuting this case.

182 "Mr. Roy Barnett
208 South LaSalle Street,
Chicago, Illinois.

Dear Mr. Barnett:

"Receipt is acknowledged of your letter dated March 27, 1951 enclosing a letter of the same date from the Exhibit Supply Company, Chicago, Illinois, concerning the special tax imposed by Section 3267 of the Internal Revenue Code and its application to a certain type of game which it manufactures.

"Pictures and instructions concerning the game were enclosed with the letter.

"The device is a coin-operated electric shooting target called 'Gun Patrol.' To increase player appeal, the device has incorporated an automatic ticket

unit which vends a ticket indicating the skill at six certain fixed scoring points. The tickets are used in some areas to draw for a weekly or monthly prize. Advice is desired as to whether the Gun Patrol should be classified as an amusement or gambling device with-
183 in the meaning of Section 3267 of the Code.

"The coin operated device 'Gun Patrol,' regardless of whether prizes are offered for scoring hits, is considered to be a coin operated amusement device since successful operation is attained by the player's skill, as distinguished from the element of chance predominant in slot machines and other similar gaming devices. Accordingly, persons maintaining for use such devices on premises occupied by them incur special tax liability of \$10.00 per year per machine."

184

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

CERTIFICATE

I hereby certify that the above and foregoing transcript comprising pages numbered consecutively from 1 to 13 is a full, true and accurate transcript of the original shorthand notes of certain proceedings had on December 5, 1955, as above set forth, before the Honorable John P. Barnes, Chief Judge of said Court. (This is not a complete transcript of all the proceedings in said cause on said day.)

Roy E. Fuller

Roy E. Fuller

Official Court Reporter

United States District Court

Northern District of Illinois

December 20, 1955.

THIS TAX RETURN MUST BE COMPLETED AND FILED WITH DISTRICT DIRECTOR

Form 11-B Rev. Mar. 1954
U. S. Treasury Department
Internal Revenue Service

**SPECIAL
TAX
RETURN**

FOR PERIOD BEGINNING
JUL 1955

to **June 30, 1956**

Make payment to the "District
Director of Internal Revenue."
Payment must be made by
cash, certified check, cashier's
check, or money order. Enter
amount of payment below.

\$50.00

WALTER THOMPSON
COMPANY'S LAUNCH
110 E. LAKEVIEW
CHICAGO ILL

Name of tax
payer

THOMPSON

REC'D WITH REMITTANCE
JUN 22 1955
DIST. DIR. CHICAGO

50.00

Show Number of Devices,
Alleys, or Tables

YEAR
2-1955

248808

For District Director's
Use Only

Return Number

23148

Date of issue

File separate return for
each class of tax.

List names and
addresses of owners
on reverse side.

See attached
instructions

File with District Director of Internal Revenue

If above information is incorrect, see Instructions.

I declare under penalties of perjury that the statements in this return are true and correct to the
best of my knowledge and belief; that this return applies only to the specified business and location;
and that the maximum number of devices, alleys, or tables for which tax is incurred is shown above.

6-22-55
(Date)

Walter Thompson
(Signature)

Owner
(Title)

Walter Korpan
102 Lake View Ave Fox Lake, Ill.
Name Home Address

List name and address of owner or individual partners.

CLASS OF TAX	Full Year	Monthly	RATE OF TAX
Gaming Device	\$250.00	\$20.83 1/3	FILE SEPARATE RETURN FOR EACH CLASS OF TAX.
Amusement Device	10.00	.83 1/3	In order to avoid penalties file your return on time with the District Director of Internal Revenue.
Bowling Alley	20.00	1.66 2/3	
Pool or Billiard Table	20.00	1.66 2/3	

THIS TAX RETURN MUST BE COMPLETED AND FILED WITH DISTRICT DIRECTOR

Form 11-B Rev. Jan. 1954
U. S. Treasury Department
Internal Revenue Service

**SPECIAL
TAX
RETURN**

FOR PERIOD BEGINNING
7-31-55
Enter (Month) (Year)
TO 6-30-56

Walter Korpan
Korpan's Landing
Fox Lake, Ill.

Class of Tax
Gaming-Pin ball

825 29
REC'D WITH REMITTANCE
36 SEP 21 1955
DIST. DIR. INT. REV.
CHICAGO 16

Show Number of Devices,
Alleys, or Tables 3

PREVIOUS YEAR'S
RETURN NUMBER 2-

For District Director's Use Only	
Return Number	2 27105
Date of Issue	

File separate return for
each class of tax.

List names and ad-
dresses of owners on
reverse side.

See attached
instructions

Make payment to the "District
Director of Internal Revenue."
Payment must be made by
cash, certified check, cashier's
check, or money order. Enter
amount of payment below.

Tax \$750.00
Pen 75.00
\$825.00

File with District Director of Internal Revenue Chicago, Ill.
If above information is incorrect, see Instructions

I declare under penalties of perjury that the statements in this return are true and correct
to the best of my knowledge and belief; that this return applies only to the specified business
and location; and that the maximum number of devices, alleys, or tables for which tax is incurred
is shown above.

9/21/55
(Date)

Walter Korpan
(Signature)

Owner
(Title)

PRINT YOUR NAME AND ADDRESS
SPECIAL-TAX RETURN
(SEE INSTRUCTIONS ON BACK)

1. Name _____
(Print name, followed by trade name—see paragraph 4 on reverse side)
2. Business address _____
(Street and number, or rural route) (City or town) (County) (State)
3. Kind of tax stamp _____ for period _____ to June 30, 19____
(See reverse side, separate form necessary for each kind of tax) (Month) (Year)

Show by X in one of the following squares the nature of the application: ☐ ADDITIONAL UNIT PLACED IN OPERATION:
☐ FIRST APPLICATION. ☐ RENEWAL ☐ CHANGE OF ADDRESS (Date) _____
☐ CHANGE OF OWNERSHIP (Date) _____ FORMER OWNER _____

NAME OF INDIVIDUAL OWNER, OR IF PART-
NERSHIP, NAMES OF ALL PARTNERS

HOME ADDRESS

Indicate below number of machines or units for which you are paying tax on
this return. File separate return for each kind of tax.

Coin-operated AMUSEMENT DEVICES (pinball and all other
amusement or music machines) \$10 each

Coin-operated GAMING DEVICES (slot machines and all other
machines involving element of chance) \$100 each

Bowling alleys \$20 each

Billiard and pool tables \$20 each

Sworn to and subscribed before me
this _____ day of _____, 19____

I swear (or affirm or acknowledge) that the above statements are true and correct
and the special-tax stamp herein applied for is to cover only the business indicated
above and at the location specified.

Cash*
Certified or Cash-
ier's Check*
Money Order*

Dollars Cents

(Signed) _____

(Official title of officer administering oath or
signatures of witnesses—see paragraph 8,
reverse side)

Received by collector _____

This return, properly executed, must be in the hands of the Collector of Internal Revenue at
with the amount of the tax, on or before the last day of the month in which liability is incurred in order to avoid penalties.

(State whether individual owner, member of firm, or if officer
of corporation, give title)

PRINT YOUR NAME AND ADDRESS
SPECIAL-TAX RETURN
(SEE INSTRUCTIONS ON BACK)

1. Name
(Print name, followed by trade name—see paragraph 4 on reverse side)

2. Business address
(Street and number, or rural route) (City or town) (County) (State) (Entered in record 10)

3. Kind of tax stamp for period to June 30, 19.....
(See reverse side, separate form necessary for each kind of tax) (Month) (Year)

Show by X in one of the following squares the nature of the application: ☐ ADDITIONAL UNIT PLACED IN OPERATION.

☐ FIRST APPLICATION.

☐ RENEWAL.

☐ CHANGE OF ADDRESS (Date)

☐ CHANGE OF OWNERSHIP (Date)

FORMER OWNER

NAME OF INDIVIDUAL OWNER, OR IF PART-
NERSHIP, NAMES OF ALL PARTNERS

HOME ADDRESS

Indicate below number of machines or units for which you are paying tax on
this return. File separate return for each kind of tax.

Coin-operated AMUSEMENT DEVICES (any amusement or
music machines) \$10 each

Coin-operated GAMING DEVICES (slot machines and all other
machines involving element of chance) \$250 each
See instructions (3)

Bowling alleys \$20 each

Billiard and pool tables \$20 each

I declare under the penalties of perjury that the above statements are true and correct to the best of my knowledge and belief,
and the special-tax stamp herein applied for is to cover only the business indicated above and at the location specified.

	Dollars	Cents
Cash*		
Certified or Cash- ier's Check*		
Money Order*		

(Signed)

Date

*Cross out forms of payment NOT used.
Make remittance payable to "Collector of In-
ternal Revenue." Enter amount in above space.

(State whether individual owner, member of firm, or if officer of corporation, give title)

Received by collector

This return must be in the hands of the Collector of Internal Revenue at
with the amount of the tax, on or before the last day of the month in which liability is incurred in order to avoid penalties.

This stamp is not transferable on change of ownership of business.

Upon change of ownership, control, address, or location notify your District Director immediately.

**WALTER KORPAN
KORPAN'S LANDING
FOX LAKE ILLINOIS**

Class of tax GAMING		Number of Devices, Alleys, or Tables 3
Period beginning July 1, 1955 or:		RETURN NUMBER 2-27105
Amount of tax \$750.00	Additions \$75.00	Total \$825.00

CHICAGO

207135

This is a tax receipt - - not a license

**EXPIRES
JUNE 30, 1956**

**KEEP THIS
STAMP POSTED**

ISSUED BY DISTRICT DIRECTOR OF INTERNAL REVENUE

UNITED STATES SPECIAL TAX STAMP INTERNAL REVENUE

THE INTERNAL REVENUE LAWS provide that the payment of any tax imposed by such laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State.

194 And afterwards, to wit, on the 5th day of December, 1955, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

195

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant Walter Korpan in his own proper person and by his counsel and the Court now having heard the final arguments of counsel and being fully advised in the premises it is

Ordered that the defendant's motions for judgment of acquittal be and the same are hereby denied and the Court finds the defendant guilty as charged in the Indictment filed herein against him and the defendant being asked by the Court if he has anything to say why the sentence and judgment of the Court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not now be pronounced it is therefore considered and

Ordered and Adjudged by the Court and is the sentence and judgment of the Court upon the finding of guilty that the defendant Walter Korpan forfeit and pay to the United States of America a fine in the sum of Seven Hundred Fifty Dollars (\$750.00) and the costs of prosecution to be taxed and on motion of the defendant by his counsel it is

Further Ordered that execution be and the same is hereby stayed for a period of Three (3) Days.

John P. Barnes

United States District Judge

December 5, 1955

98 *Motion for New Trial; Order of December 8, 1955*

196 And afterwards on, to wit, the 8th day of December, 1955 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion For New Trial in words and figures following, to wit:

197

IN THE UNITED STATES DISTRICT COURT

* * * (Caption—No. 55 CR 486) * *

MOTION FOR NEW TRIAL.

Now comes Walter Korpan, defendant, by Simon Herr his attorney, and moves the court to grant him a new trial, and assigns as reasons therefor the following:

(1) The finding and judgment of the trial court is contrary to the evidence.

(2) The finding and judgment of the trial court is contrary to the law.

For which reasons defendant prays that said Motion for a New Trial be granted.

Simon Herr

Attorney for Defendant

198 And on the same day, to wit, on the 8th day of December, 1955, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

199

IN THE UNITED STATES DISTRICT COURT

* * * (Caption—No. 55 CR 486) * *

This cause coming on for hearing on the defendant's motions for a new trial and in arrest of judgment and for enlargement of defendant on bail pending appeal come the parties by their counsel and upon due consideration the Court being fully advised it is

Ordered that said motions for a new trial and in arrest of judgment be and the same hereby are overruled and it is

Further Ordered that defendant's motion for enlargement on bail pending appeal be and the same hereby is granted and said bail is fixed at One Thousand Dollars (\$1,000.00) and it is

Further Ordered that bail on appeal be and the same hereby is fixed at One Thousand Dollars (\$1,000.00) and that one bond shall cover both of the foregoing.

200 And afterwards on, to wit, the 15th day of December, 1955 came the Appellant by his attorneys and filed in the Clerk's office of said Court his certain Notice Of Appeal (Clerk's Certificate Of Mailing Attached Thereto) in words and figures following, to wit:

201

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

NOTICE OF APPEAL.

Name and address of appellant:

Walter Korpan
Korpan's Landing
Fox Lake, Illinois

Name and address of appellant's attorneys:

Simon Herr
111 West Monroe Street
Chicago, Illinois
Crowley, Sprecher and Weeks
100 West Monroe Street
Chicago, Illinois

Offense: Appellant, Walter Korpan, was charged by indictment of having violated Section 7203 of Title 26, U. S. Code, in that he did maintain for use and permit the use on certain premises of certain coin-operated gaming devices as defined in Section 4462(a)(2) of Title 26 U. S. Code, by reason of which fact appellant was a person obligated to pay the special occupational tax on coin-operated gaming devices imposed by Section 4461(2) of Title 26 U. S. Code, and that appellant, well knowing such facts, wilfully and unlawfully failed to pay the aforesaid occupational tax.

202 Statement of Judgment or Order, and dates thereof:

On December 5, 1955 the Honorable John P. Barnes, Chief Judge of said Court, entered Judgment finding appellant, Walter Korpan, guilty as charged and imposing a fine upon the said appellant in the amount of \$750.00 and costs.

On December 8, 1955 the Honorable John P. Barnes, Chief Judge of said Court, entered Orders denying appellant's Motion for a new trial, and in arrest of Judgment.

I, Walter Korpan, the above named appellant hereby appeal to the United States Court of Appeal for the Seventh Circuit from the above said Judgment.

Walter Korpan

By *Simon Herr*

Simon Herr

Crowley, Sprecher and Weeks

Crowley, Sprecher and Weeks

Attorneys for Appellant

Dated: December 14, 1955.

203

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 480) * *

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on December 15, 1955, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure and Criminal Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Honorable Robert Ticken, United States Attorney
450 United States Court House
Chicago 4, Illinois

Honorable Kenneth J. Carrick, Clerk
United States Court Of Appeals, Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 15th day of December, 1955.

(Seal)

Roy H. Johnson

Clerk

By *Gizella Butcher*

Deputy Clerk

214 And afterwards on, to wit, the 13th day of January, 1956 there was filed in the Clerk's office of said Court a certain Appeal Bond in words and figures following, to wit:

• IN THE UNITED STATES DISTRICT COURT •

* * (Caption—No. 55 CR 486) * *

215 KNOW ALL MEN BY THESE PRESENTS, THAT Walter Korpan of Fox Lake, State of Illinois as principal, State of , as sureties, are held and firmly bound unto the United States of America in the full and just sum of One Thousand Dollars (\$1,000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 13th day of January, In the Year of our Lord, One thousand Nine Hundred Fifty-Five.

Whereas, lately on the 5th day of December, 1955, at the December Term of the United States District Court for the Northern District of Illinois Eastern Division, in a cause pending in said Court between the United States of America, Plaintiff, and Walter Korpan, Defendant, a judgment and sentence were rendered against said Walter Korpan and the said Walter Korpan having filed in the office of the Clerk of said United States District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit from the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and whereas said appeal is to operate as a supersedeas upon filing of this bond.

Now the Condition of Said Obligation Is Such, That if the said Walter Korpan shall appear in person in the United States Court of Appeals for the Seventh Circuit on the day of , A. D. 19 , of the October Term 19 , and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Court of Appeals for the Seventh Circuit, in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed and if he shall appear for trial in the United States District Court for the North-

ern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Court of Appeals for the Seventh Circuit, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

And in the event that default be made in the condition of this writing obligatory as herein provided, it shall be lawful for and the undersigned irrevocably authorize and empower the United States Attorney of said District, whoever he may be, or any Assistant United States Attorney of said District, or any Attorney authorized to appear in the United States District Court of said District, to appear for us in the said United States District Court at any time thereafter and confess a judgment in the amount of this obligation, together with costs, in favor of the United States of America and against the undersigned, without process and without a trial by jury, the undersigned hereby waiving the right of a trial by jury, and we do hereby waive and release all errors which may intervene in any such proceedings, and consent to the immediate issuance of execution upon said judgment, and we do hereby ratify and confirm all that said attorney may do by virtue hereof.

If this bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the United States District Court for the Northern District of Illinois, Eastern Division against each of the undersigned jointly and severally for the amount above stated together with interests and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

Walter Korpan
112 E. Lakeview Ave.
Fox Lake, Ill.

Signed and acknowledged
before me this 13th day of
January, 1956.

William E. Keeley, Jr.

Deputy Clerk

Approved;

Roy H. Johnson

United States District Judge

R. Tieken

Asst. U. S. Attorney

One Thousand Dollars deposited Sep. 3, 1955 on Appearance Bond to also stand as security on this home.

R. Masters, Cashier

Deputy Clerk

216 And afterwards on, to wit, the 22nd day of December, 1955 came the Defendant-Appellant by his attorneys and filed in the Clerk's office of said Court his certain Designation Of Contents Of Record On Appeal And Statement Of Points in words and figures following, to wit:

217

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 55 CR 486) * *

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Defendant-appellant, Walter Korpan, hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Seventh Circuit, taken by Notice of Appeal filed December 15, 1955; the following portions of the record, proceedings, and evidence in this cause:

1. Indictment filed September 2, 1955.
2. Appearance of defendant and his attorney, Simon Herr, filed September 8, 1955.
3. Plea of not guilty filed October 17, 1955.
4. Jury waiver filed October 25, 1955.
5. Complete transcript of proceedings had before the Honorable John P. Barnes on October 25, 1955, and Government's Exhibits 1, 2, 3, 4 and 5 and Defendant's Exhibits 1, 2, 3 and 4.
6. Those portions of the transcript of oral argument on motion for acquittal by counsel for defendant had on December 5, 1955, contained in transcript of said oral argument beginning with third full paragraph on page 9 and ending with page 13, said portions relating to two letters from United States Treasury Department to Edwin Blumenfield, dated August 17, 1951, and to Roy Barnett.
7. Judgment order entered December 5, 1955, by Honorable John P. Barnes, denying motions of defendant for judgment of acquittal, finding defendant guilty as charged, ordering defendant fined \$750 plus costs, and staying execution three days.

218

8. Motion for new trial and in arrest of judgment filed December 8, 1955, and notice thereof.
9. Order entered December 8, 1955, by Honorable John P. Barnes, overruling defendant's motion for new trial and in arrest of judgment, granting defendant's motion for enlargement on bail pending appeal, fixing bail on appeal at \$1000, one bond to cover both of the foregoing.
10. Notice of appeal filed December 15, 1955.
11. Appeal bond filed December _____, 1955.
12. This designation of contents of record on appeal.
13. Statement of points.
14. Journal entries.

Simon Herr
 Simon Herr
 105 West Monroe Street
 Chicago 3, Illinois
 Crowley, Sprecher and Weeks
 Crowley, Sprecher and Weeks
 100 West Monroe Street
 Chicago 3, Illinois

Attorneys for Defendant-Appellant

Service of copy of the foregoing designation is acknowledged this 22nd day of December, 1955.

R. Tieken by E. Tillotson
 Attorney for Plaintiff-Appellee

219

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

STATEMENT OF POINTS

The points upon which appellant will rely upon appeal are:

1. The court erred in refusing to grant defendant's motion for judgment of acquittal at the close of plaintiff's case.
2. The court erred in refusing to grant defendant's motion for acquittal at the close of all of the evidence.
3. The court erred in entering judgment finding defendant guilty as charged in the indictment.
4. The findings of the court are contrary to the law.
5. The findings of the court are contrary to the evidence.

*Statement Required under Rule 10 (c) of the Rules 105
of the United States Court of Appeals for the
Seventh Circuit*

6. The court erred in overruling defendant's motion for new trial.
7. The court erred in overruling defendant's motion in arrest of judgment.

Simon Herr

Simon Herr

105 West Monroe Street

Chicago 3, Illinois

Crowley, Sprecher and Weeks

Crowley, Sprecher and Weeks

100 West Monroe Street

Chicago 3, Illinois

Attorneys for Defendant-Appellant

220 Service of copy of foregoing Statement of Points
is acknowledged this 22nd day of December, 1955.

R. Tieken by E. Tillotson

Attorney for Plaintiff-Appellee

221 And afterwards on, to wit, the 30th day of Decem-
ber, 1955 came the Plaintiff-Appellee by its attorneys
and filed in the Clerk's office of said Court its certain State-
ment Required Under Rule 10(c) Of The Rules Of The
United States Court Of Appeals For The Seventh Circuit
And Government's Additional Designation Of Record On
Appeal in words and figures following, to wit:

222

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

**STATEMENT REQUIRED UNDER RULE 10(c) OF
THE RULES OF THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

The name of the appellee is:

UNITED STATES OF AMERICA.

The names and addresses of its counsel of record are:

R. Tieken, United States Attorney

John Peter Lalinski, Assistant United States Attorney

Anna R. Lavin, Assistant United States Attorney

William A. Barnett, Assistant United States Attorney

450 United States Court House

Chicago 4, Illinois

R. Tieken

R. Tieken

United States Attorney

106 *Government's Additional Designation of Record
on Appeal*

223

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

GOVERNMENT'S ADDITIONAL DESIGNATION
OF RECORD ON APPEAL

The United States of America, plaintiff-appellee, by R. Tieken, United States Attorney for the Northern District of Illinois, hereby designates the following for inclusion in the record on appeal to the United States Court of Appeals for the Seventh Circuit:

1. The entire transcript of proceedings had on December 5, 1955:

R. Tieken

R. Tieken

United States Attorney

JPL:RQ

224

AFFIDAVIT OF MAILING

State of Illinois

County of Cook—ss

Walter H. Sheparde being first duly sworn, on oath deposes and says that he is employed in the Office of the United States Attorney for the Northern District of Illinois; that on the 30th day of December, 1955, he placed a copy of the Government's Additional Designation in a Government franked envelope addressed to:

Name: Simon Herr, Esq. & Crowley, Sprecher & Weeks

Address: 105 W. Monroe St. 100 W. Monroe St.

Chicago 3, Ill.

Chicago 3, Illinois

and that he placed said envelope in the United States mail chute, located in the United States Courthouse, Chicago, Illinois, on said date at the hour of about 4:00 P. M.

Walter H. Sheparde.

Subscribed And Sworn to
before me this 30th day of
December, A. D. 1955.

Ruth I. Quinlan

Notary Public

225 And afterwards on, to wit, the 19th day of January, 1956 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

226

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

STIPULATION

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the originals of Government's Exhibits 1 and 2 and Defendant's Exhibits 1, 2 and 4 be certified and transmitted to the United States Court of Appeals for the Seventh Circuit by the Clerk of the United States District Court for the Northern District of Illinois, and that the said originals be made a part of the record on appeal, subject to the approval of the Court.

It is further stipulated that Government's Exhibits 3, 4 and 5 (consisting of three pin ball machines) be certified by the Clerk of the United States District Court for the Northern District of Illinois; that said exhibits be made part of the record on appeal; and that the said Exhibits be held by the said Clerk until the further order of the United States Court of Appeals for the Seventh Circuit.

227 It is further stipulated that Defendant be permitted to substitute in lieu of original Defendant's Exhibit 3, which original Exhibit counsel for Defendant has been unable to locate, a "Descriptive Statement in Lieu of Original Defendant's Exhibit 3" in words and figures as follows: "Defendant's Exhibit 3 is a preliminary tax receipt numbered 3197501 and issued by the District Director of the Internal Revenue Service, Chicago, Illinois, to Walter Korpan, Korpan's Landing, Fox Lake, Illinois, acknowledging payment by Walter Korpan of \$750.00 tax and \$75.00 additions, or a total of \$825.00, for these gaming devices for the period beginning July 1, 1955 and expiring June 30, 1956;" that the said Statement be filed, certified

and made a part of the record on appeal in lieu of the original of Defendant's Exhibit 3, subject to the approval of the Court.

R. Ticken, U. S. Attorney
Attorney for Plaintiff-Appellee
Simon Herr
Simon Herr

105 West Monroe Street

Chicago 3, Illinois

Crowley, Sprecher and Weeks

Crowley, Sprecher and Weeks

100 West Monroe Street

Chicago 3, Illinois

Attorneys for Defendant-Appellant

228 And on the same day to wit, on the 19th day of January, 1956, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

229

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 CR 486) * *

O R D E R

This cause coming on to be heard upon the stipulation of the parties:

It Is Ordered that the originals of Government's Exhibits 1 and 2 and Defendant's Exhibits 1, 2 and 4 be certified and transmitted to the United States Court of Appeals for the Seventh Circuit by the Clerk of the United States District Court for the Northern District of Illinois, and that the said originals be made a part of the record on appeal.

It Is Further Ordered that Government's Exhibits 3, 4 and 5 (consisting of three pin ball machines) be certified by the Clerk of the United States District Court for the Northern District of Illinois; that said exhibits be made part of the record on appeal; and that the said Exhibits be held by the said Clerk until the further order of the United States Court of Appeals for the Seventh Circuit.

It Is Further Ordered that Defendant be allowed leave to substitute in lieu of original Defendant's Exhibit 3
230 a Descriptive Statement in Lieu of Defendant's Orig-

inal Exhibit 3" in words and figures as follows: "Defendant's Exhibit 3 is a preliminary tax receipt numbered 3197501 and issued by the District Director of the Internal Revenue Service, Chicago, Illinois, to Walter Korpan, Korpan's Landing, Fox Lake, Illinois, acknowledging payment by Walter Korpan of \$750.00 tax and \$75.00 additions, or a total of \$825.00, for these gaming devices for the period beginning July 1, 1955 and expiring June 30, 1956"; and that the said Statement be filed, certified and made a part of the record on appeal in lieu of the original of Defendant's Exhibit 3.

John P. Barnes
United States District Judge

Dated: January 19, 1956.

231 United States of America
Northern District of Illinois—ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designations of Contents Of Record On Appeal filed in this Court in the cause entitled: United States of America, Plaintiff vs. Walter Korpan, Defendant, No. 55 CR 486, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the exhibits which are incorporated herein originally by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 23rd day of January, 1956.

(Seal)

Roy H. Johnson

Clerk

By. Gizella Butcher

Deputy Clerk

232 United States of America
Northern District of Illinois—ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete Supplemental Record in lieu of portions of original record, heretofore certified to the United States Court of Appeals, Seventh Circuit, on January 23, 1956, which have been lost or mislaid.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 9th day of May, 1956.

(Seal)

Roy H. Johnson

Clerk

By Gizella Butcher

Deputy Clerk

111 In the United States Court of Appeals for the
Seventh Circuit

No. 11669

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

WALTER KORPAN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION

Before DUFFY, Chief Judge, SWAIM and SCHNACKENBERG, Circuit
Judges

Opinion

September 28, 1956

SWAIM, Circuit Judge. This case comes here on appeal from a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the defendant, Walter Korpan, guilty of having violated § 7203 of Title 26 U. S. C. A., and fining the defendant \$750.00 plus costs.

The indictment charged and the trial court found that the defendant, on premises occupied by him, maintained and permitted the use of certain coin-operated gaming devices as defined in § 4462 (a) (2) of Title 26 U. S. C. A.; that the defendant thereby became obligated to pay the special occupation tax imposed by § 4461 (2) of Title 26 U. S. C. A.; and that the defendant willfully failed to pay such tax in violation of § 7203 of Title 26 U. S. C. A.

The decisive issue is whether the coin-operated machines in question are amusement devices as defined in Section
112 4462 (a) (1) or gaming devices as defined in paragraph (a) (2) thereof. If the machines here in question were described by subsection (a) (1) they were subject to a tax of only \$10.00 a year but if they were gaming devices as described in subsection (a) (2) the annual tax on each machine was \$250.00. 26 U. S. C. A. § 4461.

The facts, briefly, are as follows: The defendant operates a vacation resort known as "Korpan's Landing" in Fox Lake, Illinois. On August 12, 1955, certain coin-operated devices (commonly known as "pinball machines") were located in the resort's main building, a combination restaurant and tavern. On June 22, 1955, the defendant filed a tax return for the fiscal year July 1,

1955 through June 30, 1956, covering five amusement coin-operated devices and paid the tax of \$10.00 per device. During the month of August 1955 the defendant exhibited an amusement device tax stamp for the machines in question.

The three machines involved in this litigation are basically alike. The insertion of a coin (a dime) activates the game and brings the first of five balls in front of a ball plunger. The game is played on an inclined board containing a number of holes into which the balls may enter. By pulling the plunger back and releasing it the ball is put into play. The legs of these games are so constructed as to allow a certain "give" which permits the player to "nudge" the machine forward, backward or sideward. The playing surface contains numerous rubber ringed posts and the player may nudge the game and cause the ball to contact one of these posts thereby increasing or cushioning the rebound of the ball. Scores are credited to the player if he causes a ball to roll into the holes. The scoring is registered on a vertical glass panel on the back of the board. Free replays are scored upon principles similar to bingo, i. e., the lighting of three, four or five lights in a row (horizontally, vertically or diagonally). The player to some extent may control the course the ball will travel on the playing surface. The ball plunger rests inside a ball guide plate which is calibrated with either six or seven scored lines to permit the player to gauge the intensity of his shots. This permits the player to attempt to shoot the ball to the right or left side of the playing field. As noted above, the player may nudge

the game in an attempt to control the course of the ball
 113 once it enters the playing surface. Each machine is equipped with a "tilt" device (which may be adjusted), and if the game is nudged too strongly this device will cause the word "tilt" to appear on the scoring panel and make the machine inoperative until an additional coin is inserted. The possibility of scoring more replays (by raising the odds) is increased by depositing additional coins. Additional balls may also be secured by depositing additional coins when the original five balls have been expended. An extra ball is not always obtained by the deposit of an additional coin. The extra ball feature may either be disconnected or adjusted to increase or reduce the possibility of obtaining an extra ball. The machines also incorporate certain "game features" which afford additional methods of scoring replays. These "added attractions" are determined by an electrical system. The only control the player has over such features is by depositing additional coins which may or may not produce a given feature. The machines also house a device known as a "reflex unit." Although there was dispute as to its precise function, it appears that it more or less balances out the high win-

ings as against small winnings. That is, the total replays will tend to be the same over a given period of time. The replays that are won are registered by an electrical scoring mechanism on the score board. The player has the choice of playing off the games won or of receiving money for them from the defendant. Each machine has a device called a replay meter housed behind a locked door next to the cash box inside the machine. When cash is paid for games won, the proprietor presses a cancellation button on the bottom of the machine which removes the games won from the scoreboard and registers them on the replay meter inside the machine. This serves as an accounting device which permits the collection man to determine the number of games paid for by the proprietor for the purpose of reimbursing him.

It is undisputed that on August 12, 1955, the defendant made cash payments to witness Annette L. Veit in the sum of \$1.00 for ten replays and to witness John M. Shannon in the sum of \$1.20 for twelve replays.

It is the contention of the defendant that the plain meaning of 26 U. S. C. A. § 4462 (a) (2) and the intent of Congress in the enactment thereof expressly exclude the machines in question from the definition of gaming devices as set forth in that paragraph and that these machines are coin-operated amusement devices as defined in paragraph (a) (1) thereof.

The relevant portion of Section 4462 is as follows:

“§ 4462. Definition of coin-operated amusement or gaming device.

“(a) In general.—As used in sections 4461 to 4463, inclusive, the term ‘coin-operated amusement or gaming device’ means—

“(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

“(2) so-called ‘slot’ machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.”

Section 4462 (a) (2) lays down three requirements in defining a coin-operated gaming device: (1) it must be operated by means of the insertion of a coin or similar object; (2) the application of the element of chance must be involved by virtue of which, (3) the machine may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens.

It is the Government's contention that if a particular machine incorporates these three incidents it meets the definition of a coin-operated gaming device and consequently is subject to the gaming tax rate of \$250.00 for each such machine. The difficulty with

this argument is that it overlooks the introductory language of paragraph (a) (2), i. e., "so-called 'slot' machine."

If the dictionary definition of "slot machine" were applied, it is clear that these machines would be covered by the definition of coin-operated gaming device.

"A machine the operation of which is started by dropping a coin in a slot." Webster's New International Unabridged Dictionary, 2d Ed. 1955.

When this definition is considered with the choice of language employed by Congress, i. e., "so-called 'slot' machine which
115 operates by means of the insertion of a coin, token or similar object * * *," it would appear that Congress intended a more-restrictive meaning for the term "slot machine." Otherwise, there appears no purpose for the use of the language "so-called 'slot' machine."

The term "so-called" is a modifying word implying doubt as to the correctness or propriety of so designating a thing. See Webster's New International Unabridged Dictionary, 2d Ed. 1955. And the use of quotation marks to set off the word "slot" indicates that Congress did not intend the language "so-called 'slot' machine" to be as comprehensive as the dictionary definition of "slot machine." Every word used in a statute is presumed to have a meaning and purpose, and, if possible, every word must be accorded significance and effect. *Washington Market Co. v. Hoffman*, 101 U. S. 112; *Adler v. Northern Hotel Co.*, 7 Cir., 175 F. 2d 619. We conclude, therefore, that not only must these machines incorporate the three incidents noted above, but they must also be "so-called 'slot' machines."

Since the term "so-called 'slot' machine" is not adequately defined in Section 4462 nor elsewhere in the Internal Revenue Code, it becomes necessary to resort to extrinsic evidence in order to accord meaning and purpose to this language.

The defendant in urging this point suggests that the term "slot machine" as used in Section 4462 refers specifically to a machine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit (colloquially called a "one-armed bandit").

There is force to this conclusion when the language thus employed is reviewed in light of the legislative history of Section 4462.

Before reviewing the legislative history of this statute it would be well to consider the argument advanced by the Government that the statute is clear and unambiguous, and that consequently there is no necessity for looking behind the words of the statute

in order to determine what the intent of Congress was. We do not believe, however, that these words are sufficient in and of themselves to determine the purpose of the legislation.

116 In such an event "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." *United States v. American Trucking Associations, Inc.*, 310 U. S. 534 at pages 543-44.

Sections 4461 to 4463 of the Internal Revenue Code were proposed by the House of Representatives of the 77th Congress. They were part of the Revenue Revision of 1941. As passed by the House a tax of \$25.00 was assessed on each "coin-operated amusement and gaming device." H. R. 5417, § 555. These devices were defined as:

"(1) so-called '*pin-ball*' and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object, and

"(2) so-called '*slot*' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens." [Emphasis added.]

The report of the Ways and Means Committee also indicates an intent to exclude pinball machines from the category of slot machines. The report stated: "Coin-operated amusement or gaming devices are, briefly, machines which fall within the general classification colloquially referred to as '*pin-ball*' machines and '*slot machines*'." H. R. Rep. No. 1040, 77th Cong. 1st Sess. P. 60 (1941). The proposed bill, as subsequently passed by the Senate, apparently accepted the exclusion of pinball machines from the definition of slot machines, and reduced the tax on the former to \$10.00 per device and raised the tax on the latter to \$50.00 per device. The report of the Senate Finance Committee explained its proposed amendment as follows:

"The House bill places a special tax of \$25 per year upon each coin-operated amusement or gaming device maintained for use on any premises.

"Your Committee divides these devices into two categories.

117 Upon so-called *pin-ball* or other amusement devices operated by the insertion of a coin or token, the tax is reduced to \$10 per year. Upon so-called slot machines, however, the tax is placed at \$200. per year." Sen. Rep. No. 673, 77th Cong. 1st Sess. P. 21 (1941). [Emphasis added.]

The House accepted the Senate amendments. See H. R. Rep. No. 1203, 77th Cong. 1st Sess. P. 18 (1941), and the bill as amended

became law as Section 3267 of the Internal Revenue Code of 1939—Public Law 250, 77th Cong. 1st Sess.

Subsequent to the outbreak of war Section 3267 was amended. The original language of the House bill of 1941 was amended to read: "any amusement or music machine * * *." H. R. 7378, § 617. The purpose of the amendment was to enlarge the category of machines subject to taxation. It might be inferred that by dropping the term "pinball machine" from the definition of coin-operated amusement device Congress intended to treat such machines as gaming devices. However, in H. R. Rep. No. 2333, 77th Cong. 2d Sess. P. 180 (1942), it was stated:

"This section amends section 3267 of the Code by defining the term 'coin-operated amusement devices' to include all amusement machines and music machines operated by means of the insertion of coins, tokens, or similar objects. Under this amendment there will be included *in addition to pin-ball machines* a great variety of other machines, such as baseball and football games, machine-gun games, music machines (so-called juke boxes), and many other types of coin-operated games." [Emphasis added.]

See also Sen. Rep. No. 1631, 77th Cong. 2d Sess. P. 266 (1942), and Congressman Eberharter's statement made at hearings before the Committee on Ways and Means. Hearings, 83rd Cong. 1st Sess. P. 2517.

With the exception of increases in the rate of taxation and technical changes of form adopted in 1954, the provisions of Section 3267, as amended in 1942, remain unchanged as Sections 4461 to 4463 of the Internal Revenue Code.

Although the legislative history of Section 4462 does not clearly demonstrate the meaning and purpose which Congress intended to attribute to the language, "so-called 'slot' machine," it does indicate that Congress intended to exclude pinball machines from the category of gaming devices.

The Government, nevertheless, contends that these machines are coin-operated gaming devices which entitled winning players to receive cash. The Government cites state court decisions holding that machines similar to the ones here involved are gaming devices. See *People v. One Mechanical Device*, 9 Ill. App. 2d 38, 132 N. E. 2d 338; *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P. 2d 1113. However, these cases are inapposite for they concern the construction of local legislation which employ terminology quite different from that in Section 4462. Cf. Ill. Rev. Stats. Ch. 38, § 342 (1955). The Government also cites *Johnson v. Phinney*, 5 Cir., 218 F. 2d 303, for the proposition that a pinball machine is a game of chance. The issue there arose out of the applicability of the wagering tax and is clearly distinguishable. Further, the question here is not whether pinball machines are

gaming devices or games of chance; that they are may well be conceded. The question is rather: are pinball machines embraced within the term "so-called 'slot' machines." Congress has clearly indicated that they are not.

Statutes which relate to the same thing or same class of things are often helpful in construing a particular statute. See *Great Northern Ry. v. United States*, 315 U. S. 262.

The Johnson Act, passed on January 2, 1951, prohibits the interstate shipment of gambling devices which it defines as follows:

"(1) any so-called 'slot machine' or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon and (A) which when operated may deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

"(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property * * *." 15 U. S. C. A.

§ 1171.

119. If this definition were applied to the machines here involved it is clear that they are without its scope. A drum or reel with insignia thereon is not an essential part of defendant's machines, nor are these machines designed and manufactured so that when operated they may deliver any money or property.

We have been referred to only two cases which have considered the question before us. *Tooley v. United States*, 134 F. Supp. 162; *United States v. One Bally Dade Ranch Coin-Operated Pin-Ball Machine* (Civil Action No. 1778, D. C. M. D. Tenn., Dec. 10, 1953). The Tooley case was an action for refund of a portion of special occupation tax paid for a certain coin-operated device known as the "Sidebottom Super Crane Machine." The court there did not consider the meaning of the term "so-called 'slot' machine," as used in the statute, but concluded that "the expression 'by application of the element of chance' as used in said section 3267 (b) (2) [predecessor to the statute here involved] merely requires that there be a substantial element of chance involved in the play of the machine, and does not require that the element of chance predominate over the element of skill."

The defendant has urged that since the play of a pinball machine involves a modicum of skill it is not a machine which "by application of the element of chance * * * may deliver, or entitle the person playing or operating the machine to receive

cash * * *." In our view of the case we do not reach this question and voice no opinion thereon.

The One Bally Dude Ranch case, a forfeiture action, was on a motion for summary judgment. We have been informed that a hearing on the merits had been continued.

The Government concludes from two cases under the Johnson Act, 15 U. S. C. A. § 1171, that devices far removed from "so-called 'slot' machines," i. e., certain "digger" machines, have been held subject to the gaming tax. *United States v. 24 Digger Merchandising Machines*, 8 Cir., 202 F. 2d 647, cert. denied 345 U. S. 998; *United States v. 10 Digger Machines*, 109 F. Supp. 825. However, the Johnson Act contains a broader definition of "gambling device" than the definition which we must interpret in the instant case.

120 Only one last point need be considered. The Government insists that Treasury Department regulations include pinball machines as gaming devices where unused free plays are redeemed, and such regulations are entitled to the force and effect of law. T. D. 5203, 1942-2 Cum. Bul. 276, 26 C. F. R. 323.22. But it is elementary law that a Treasury regulation which is inconsistent with a provision of the Internal Revenue Code has no force and effect. The Government, nevertheless, urges that these regulations have been in effect throughout subsequent amendments of Section 4462 and that it must therefore be assumed that the regulations have received Congressional approval.

We cannot assume on the facts of this case that Congress considered T. D. 5203, as stating the true construction of Section 4462 when it is shown that only of late has the regulation been followed. See *Casey v. Sterling Cider Co.*, 1 Cir. 294 Fed. 426.

We conclude that the pinball machines here involved are not gaming devices as defined in 26 U. S. C. A. § 4462 (a) (2).

For the reasons set forth above, the judgment of the District Court is reversed.

[Clerk's Certificate to foregoing paper omitted in printing.]

121 In United States Court of Appeals for the Seventh Circuit

No. 11669

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WALTER KORPAN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION

Before Hon. F. RYAN DUFFY, Chief Judge, Hon. H. NATHAN
SWAIM, Circuit Judge, Hon. ELMER J. SCHNACKENBERG, Circuit
Judge

Judgment

September 28, 1956

This cause came on to be heard on the transcript of the record
from the United States District Court for the Northern District
of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this
court that the judgment of the said District Court in this cause
appealed from be, and the same is hereby, reversed.

122 [Clerk's certificate to foregoing transcript omitted in
printing.]

123 In Supreme Court of the United States

October Term, 1956

UNITED STATES OF AMERICA

v.

WALTER KORPAN

Order extending time to file petition for writ of certiorari

October 26, 1956

Upon consideration of the application of counsel for peti-
tioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 27, 1956.

HAROLD H. BURTON,
Associate Justice of the Supreme Court of the United States.

Dated this 26th day of October 1956.

124

Supreme Court of the United States

No. 596, October Term, 1956

Order allowing certiorari

Filed January 21, 1957

[Title omitted.]

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED

NOV 27 1956

JOHN T. FEY, Clerk

No. 596

In the Supreme Court of the United States

October Term, 1956

UNITED STATES OF AMERICA, PETITIONER

WALTER KOPAT

PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No.

UNITED STATES OF AMERICA, PETITIONER

v.

WALTER KORPAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, reversing the judgment of the United States District Court for the Northern District of Illinois which had adjudged respondent guilty of having failed to pay the tax imposed on coin-operated "so-called 'slot' machines."

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 15-26) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered September 28, 1956 (App. A, *infra*, p. 27). On Octo-

ber 26, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Burton to and including November 27, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a pin-ball machine the operation of which involves the element of chance as the result of which the player may become entitled either to free plays or to money is the type of gaming device which is subject to the tax imposed by 26 U. S. C. (Supp. III) 4461 (2) upon "so-called 'slot' machines" as defined in 26 U. S. C. (Supp. III) 4462 (a).

STATUTES AND REGULATIONS INVOLVED

The Internal Revenue Code of 1954, 26 U. S. C., Supp. III, provides in pertinent part:

SEC. 4461. IMPOSITION OF TAX.

There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:

(1) \$10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);

(2) \$250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and

(3) \$10 or \$250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. * * *

SEC. 4462. DEFINITION OF COIN-OPERATED AMUSEMENT OR GAMING DEVICE.

(a) *In general.*—As used in sections 4461 to 4463, inclusive, the term “coin-operated amusement or gaming device” means—

(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

(2) so-called “slot” machines which operate by means of insertion of a coin token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens,

(b) *Exclusion.*—The term “coin-operated amusement or gaming device” does not include bona fide vending machines in which are not incorporated gaming or amusement features.

(c) *1-cent vending machine.*—For purposes of sections 4461 to 4463, inclusive, a vending machine operated by means of the insertion of a 1-cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens, shall be classified under paragraph (1) and not under paragraph (2) of subsection (a).

Treasury Regulation 59, Section 323.22, as amended by T. D. 5203, 7. F. R. 10835, (26 C. F. R. (1949 ed.) 323.22 (b)), provides:

* * * * *

Examples of machines which, when operated by means of the insertion of a coin, token, or similar object, are regarded as gaming devices for purposes of these regulations are:

(a) A “pin-ball” machine with respect to which unused “free plays” are redeemed in

cash, tokens, or merchandise, or with respect to which prizes are offered to any person for the attainment of designated scores.

(b) A machine which, even though it does not dispense cash or tokens, has incorporated gaming features in the form of combinations of insignia on reels or drums.

STATEMENT

An indictment returned in the United States District Court for the Northern District of Illinois charged respondent with having wilfully failed to pay the special occupational tax imposed by 26 U. S. C. 4461 (2) *supra*, p. 2, upon coin operated "so-called 'slot' machines" as defined in 26 U. S. C. 4462 (a) (2), *supra*, p. 3, maintained on respondent's premises (R. 3). Respondent, having waived jury trial (R. 4), was convicted by the court and sentenced to pay a fine of \$750 (R. 97).

The disputed issue was whether the machines in respondent's premises were coin-operated gaming devices as defined in 26 U. S. C., Supp. III, 4462 (a), *supra*, p. 3, on which the tax to be paid is \$250 or whether they were amusement devices under 26 U. S. C., Supp. III, 4462 (a) (1), *supra*, p. 3, with which respondent had complied by paying the \$10 tax (R. 11). The evidence showed that the machines were pin-ball machines activated by insertion of a coin which entitled the player to five balls. Certain scores resulted in free replays which were registered by an electrical scoring mechanism on the scoreboard (R. 24, 45, 47, 57). The possibility of scoring more replays by raising the odds could be increased by depositing addi-

tional coins (R. 25, 48). Additional balls could also be secured by depositing additional coins after the first five balls had been expended, although an extra ball was not always obtained by deposit of the additional coin (R. 26, 27, 66). There were also "game features" affording additional methods of obtaining replays which were determined by an electrical current over which the player had no control except by depositing coins which might or might not produce the hoped for result (R. 59, 62, 68-69). The player had the choice of playing off the replays or receiving money for them (R. 19, 29). Certain players were proved to have received money at their request (R. 19-20, 29).

In adjudging the defendant guilty, the District Court necessarily found the machines were within the definition of Section 4462 (a) (2). The Court of Appeals reversed, holding that the machines were not within Section 4462 (a) (2) even though they might well be deemed gaming devices since, in the court's view, the legislative history indicated "that Congress intended to exclude pinball machines from the category of gaming devices" (App. A, *infra*, p. 23). The Court of Appeals regarded the Treasury Regulation under which the machines in question would be considered subject to the \$250 tax as inconsistent with the statute (App. A, *infra*, p. 26).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals, which adopts an interpretation of Section 4462 (a) at variance with that of the Treasury Department since 1942, has already had and will continue to have a serious

effect on the revenue and on the enforcement of federal gambling laws. It is estimated by the Treasury that revenue of approximately \$3,500,000 per year is affected by the interpretation of the statute announced below. Approximately 100 criminal convictions and several hundred forfeitures have already been had under the Treasury's interpretation of the statute as covering pin-ball machines so operated as to involve the chance receipt of money or free games by the player. In addition, there are numerous cases, criminal and civil, now pending before District Courts in which the same issue is involved. In reliance on the decision below, the District Court for Minnesota, on November 6, 1956, in two consolidated cases, reversed a previous ruling refusing to dismiss indictments involving substantially similar machines and dismissed the indictments (which described the machines) on the ground that they failed to charge an offense under the statute. From that decision, a copy of which is set forth in Appendix B, *infra*, pp. 28-34, a direct appeal to this Court under 18 U. S. C. 3731 has been taken. Several similar indictments have also been dismissed by the District Court for Arizona and appeals will be noted in those cases as well. Since, therefore, the issue will be before the Court on those direct appeals, and the present decision is in effect incorporated into those appeals, it is respectfully suggested that this case should also be reviewed.

2. The opinion of the Seventh Circuit is largely based on its interpretation of the legislative history of the statute as showing that the definition of "so-called 'slot' machines" in Section 4462 (a) (2), *supra*, p. 3,

was not intended to include any form of pin-ball machine, even though the particular pin-ball machines are within the literal terms of the statute since their operation involves a substantial element of chance as the result of which the player may receive money.

In so doing, the court has interpreted some equivocal words in various Congressional reports without considering the problem to which these reports relate. Consideration of the history which led up to the reports, as well as of the statute, demonstrates that Congress intended to draw a distinction, not between pin-ball machines *per se* and the slot machines known as "one arm bandits", but between machines with the primary function of amusement (a category which includes many pin-ball machines) and machines with the primary function of acting as a gaming device (including pin-ball machines operated as were the devices in this case). This legislative history also shows that all gaming devices were to be subject to the heavier \$250 tax, whether they involved pin-balls or not.

(a). The proposal to tax coin-operated machines was first made as part of the Revenue Act of 1941, and as originally passed by the House of Representatives would merely have taxed all coin operated amusement or gaming devices at the same rate (see H. Rep. 1040, 77th Cong., 1st sess., p. 60). The machines, all to be subject to the same tax, were defined as:

(1) so-called "pin-ball" and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object, and

(2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens.

The Senate Committee proposed that a distinction be made between gaming devices and amusement devices, with a lower tax for "*so-called pinball or other amusement devices*" (emphasis added) (S. Rep. No. 673, 77th Cong., 1st sess., p. 21). Senator Clark of Missouri, who proposed the amendment (87 Cong. Rec. 7298), made it clear that the purpose was to distinguish between gambling machines and those pin ball machines which were played "without any hope of recompense, without any premium". 87 Cong. Rec. 7298. The following colloquy makes clear the intent to differentiate between machines on the basis of their use and not their name or method of operation (87 Cong. Rec. 7301):

Mr. CLARK of Missouri. The definition is perfectly plain. In lines 5 and 6 is this provision:

(1) \$10 per year in the case of a device defined in clause (1) of subsection (b):

Subsection (b) reads in part:

Definition: As used in this part, the term "coin-operated amusement and gaming devices" means (1) ~~so~~ so-called pin-ball and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object.

Referring now to line 17:

(2) so-called slot machines which operate by means of insertion of a coin, token, or similar

object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

Mr. President, clause 2 of subparagraph (b) certainly takes out from the operation of clause (1) any machine which returns any sort of a premium, and that was the intention of the amendment, and it was the intention of the committee in adopting it.

Mr. BARKLEY. Mr. President, let me ask the Senator a question.

Mr. CLARK of Missouri. I shall be glad to answer, if the Senator from Nevada will yield.

Mr. McCARRAN. I yield.

Mr. BARKLEY. It refers to "a coin-operated amusement or gaming device," and under clause No. 1 it is still necessary to put in a coin in order to operate the machine.

Mr. CLARK of Missouri. There is no question about that.

Mr. BARKLEY. What does one get for the coin?

Mr. CLARK of Missouri. He does not get anything except the pleasure of playing the game.

Mr. BARKLEY. He has the pleasure of putting the coin in without the chance of getting anything back?

Mr. CLARK of Missouri. Yes.

Mr. BARKLEY. Under clause 2 there is a chance to get something back. That is the difference?

Mr. CLARK of Missouri. That is the difference between any sort of an ordinary amusement, for instance, riding on a chute-the-chute and playing the roulette wheel. The Senator has stated the difference just as well as it could be stated.

Mr. BARKLEY. In the case of the roulette wheel, I do not think there is a chance of getting anything back.

Mr. CLARK of Missouri. Not do I, but very few people play the roulette wheel without the hope of getting something back. The Senator from Kentucky has precisely stated the difference between amusement and gambling, as well as it could possibly be stated by a corps of experts after months of testimony.

The conference report on the bill (H. Rep. 1203, 77th Cong., 1st sess., p. 18) describes the final bill as follows:

Amendment No. 147: The House bill imposed an occupational tax of \$25 per annum with respect to the operation of a pin-ball game, a slot machine, or similar amusement or gaming device. The [Senate] amendment establishes two different rates of tax: \$10 per annum in the case of a pin-ball game, *or similar game or amusement machine*, and \$50 with respect to so-called slot machines, *the operation of which involves an element of chance*; and the House recedes. [Emphasis added.]

(b). In the Spring of 1942, during the Hearings before the Committee on Ways and Means of the House of Representatives on Revenue Revision of 1942, 77th Cong., 2d sess., various complaints about the tax were voiced by representatives of the coin-operated machine industry. One of the complaints was that penny candy machines, which gave out additional prizes for certain combinations, were being taxed as gambling devices (Hearings, vol. 2, pp. 2278-2280, vol. 3, 2682-2688). Another complaint was that

the Treasury Department, since February 1942, was interpreting the classification of machines as amusement or gambling by usage, *i. e.*, by whether prizes were obtained thereby, rather than by the physical characteristics of the machines. The suggestion was offered that the tax should be determined by the physical characteristic of the machines (Hearings, vol. 2, pp. 2055-2061; see particularly pp. 2056-2057).

Similar complaints were voiced in the Hearings before the Committee on Finance, United States Senate, 77th Cong., 2d sess., on H. R. 7378, both as to penny vending machines (Vol. 1, pp. 1135-1141), and as to the classification according to usage rather than according to physical characteristics (Vol. 1, p. 1133, Vol. 2, pp. 2256-2259). One industry representative stated (Vol. 1, p. 1134): "The taxing provisions as they now stand attempt to make a distinction between games of chance and games of pure amusement, but make no distinction as to the degree of chance which in turn affects the ability of the machine to pay the tax imposed."

As finally passed, the 1942 Act dropped the classification of "so-called 'pinball' or other amusement devices" for the term "coin-operated amusement devices" so as to include various other games and music machines. It created an exemption for the penny vending machines, under certain limitations. See Section 4462 (c), *supra*, p. 3. But despite the complaints that the Treasury Department's interpretation of the "so-called 'slot' machine" definition was erroneously based on usage, no change in the law was made in this respect. 56 Stat. 978. It seems

reasonable to conclude that Congress was satisfied with the Treasury's reading.

(c). The Treasury's construction of the "so-called 'slot' machine" definition as dependent on whether premiums were returnable as a result of an element of chance was formally set forth in Regulations 59, Section 323.22, as amended by T. D. 5203, approved December 22, 1942, quoted *supra*, pp. 3-4. While, there have been some individual variations in rulings as to specific factual situations, as noted by respondent before the District Court (R. 89-91), this is the regulation which is still in effect.¹

Congress was made aware of this interpretation during the hearings on the 1954 Internal Revenue Code. Representatives of the industry made essentially the argument adopted by the court below in this case, that no pin-ball machines should be deemed within the "slot machine" definition. Hearings before House Committee on Ways and Means, 83rd Cong., 1st sess., on General Revision of the Internal Revenue Code, Part 4, pp. 2505-2522; Hearings before the Senate Committee on Finance on H. R. 8300, 83rd Cong., 2d sess., Part 4, pp. 1874-1879. Amendments were proposed to have the higher rate apply only to the "one-arm bandit" type of machine (House Hearings, p. 2510, Senate Hearings, p. 1879).

Again, the statute was reenacted without change in the pertinent definition. 68A Stat. 531. Since the administrative interpretation had been clearly and specifically pointed out to the congressional commit-

¹ Under Section 7807 of the 1954 Code, previous regulations remain in force until new regulations are issued.

tees, this reenactment "bespeaks congressional approval." *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46, 53; *Helvering v. Winnill*, 305 U. S. 79, 83.

In the light of this course of history since 1941, the Court of Appeals was not warranted in interpreting the statutory definition as it did, or in failing to give proper weight to the Treasury's regulation.

3. The court below also found support for its ruling in the fact that the Slot Machine (Johnson) Act, 64 Stat. 1134 (1951), 15 U. S. C. 1171-1177, banning transportation of slot machines in interstate commerce, defines the machines to which it applies as follows:

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property * * *

We do not concede that the machines in question would not fall within the ban of the Slot Machine Act. They have drums or reels with insignia thereon for

scoring replays which are sufficiently an essential part of the machine to come within the definition of that Act. But, in any event, we do not regard the terminology of that Act as controlling here, since the history and purposes of the two statutes are different. The objective of the Slot Machine Act is to place an outright ban on the machines from interstate commerce, except as to states which permit them. The aim of the instant statute is, in large part, to raise revenue, as well as to discourage gambling. Congress could well have decided not to use its drastic power to prohibit pin-ball machines of the kind used here while it nevertheless regarded them as entirely capable of paying the higher tax which it imposed on gambling (as distinguished from amusement) devices.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,

Solicitor General.

WARREN OLNEY III,

Assistant Attorney General.

BEATRICE ROSENBERG,

Attorney.

NOVEMBER 1956.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

No. 11669. September Term and Session, 1956

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WALTER KORPAN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN
DIVISION

September 28, 1956

Before DUFFY, *Chief Judge*, SWAIM and SCHNACK-
ENBERG, *Circuit Judges*.

SWAIM, *Circuit Judge*. This case comes here on appeal from a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the defendant, Walter Korpan, guilty of having violated § 7203 of Title 26 U. S. C. A., and fining the defendant \$750.00 plus costs.

The indictment charged and the trial court found that the defendant, on premises occupied by him, maintained and permitted the use of certain coin-operated gaming devices as defined in § 4462 (a) (2) of Title 26 U. S. C. A.; that the defendant thereby became obligated to pay the special occupation tax imposed by § 4461 (2) of Title 26 U. S. C. A.; and that the defendant willfully failed to pay such tax in violation of § 7203 of Title 26 U. S. C. A.

The decisive issue is whether the coin-operated machines in question are amusement devices as defined in Section 4462 (a) (1) or gaming devices as defined in paragraph (a) (2) thereof. If the machines here in question were described by subsection (a) (1) they were subject to a tax of only \$10.00 a year but if they were gaming devices as described in subsection (a) (2) the annual tax on each machine was \$250.00. 26 U. S. C. A. § 4461.

The facts, briefly, are as follows: The defendant operates a vacation resort known as "Korpan's Landing" in Fox Lake, Illinois. On August 12, 1955, certain coin-operated devices (commonly known as "pinball machines") were located in the resort's main building, a combination restaurant and tavern. On June 22, 1955, the defendant filed a tax return for the fiscal year July 1, 1955 through June 30, 1956, covering five amusement coin-operated devices and paid the tax of \$10.00 per device. During the month of August 1955 the defendant exhibited an amusement device tax stamp for the machines in question.

The three machines involved in this litigation are basically alike. The insertion of a coin (a dime) activates the game and brings the first of five balls in front of a ball plunger. The game is played on an inclined board containing a number of holes into which the balls may enter. By pulling the plunger back and releasing it the ball is put into play. The legs of these games are so constructed as to allow a certain "give" which permits the player to "nudge" the machine forward, backward or sideward. The playing surface contains numerous rubber ringed posts and the player may nudge the game and cause the ball to contact one of these posts thereby increasing or cushioning the rebound of the ball. Scores are credited to the player if he causes a ball to roll into the holes. The scoring

is registered on a vertical glass panel on the back of the board. Free replays are scored upon principles similar to bingo, i. e., the lighting of three, four or five lights in a row (~~horizontally, vertically or diagonally~~). The player to some extent may control the course the ball will travel on the playing surface. The ball plunger rests inside a ball guide plate which is calibrated with either six or seven scored lines to permit the player to gauge the intensity of his shots. This permits the player to attempt to shoot the ball to the right or left side of the playing field. As noted above, the player may nudge the game in an attempt to control the course of the ball once it enters the playing surface. Each machine is equipped with a "tilt" device (which may be adjusted), and if the game is nudged too strongly this device will cause the word "tilt" to appear on the scoring panel and make the machine inoperative until an additional coin is inserted. The possibility of scoring more replays (by raising the odds) is increased by depositing additional coins. Additional balls may also be secured by depositing additional coins when the original five balls have been expended. An extra ball is not always obtained by the deposit of an additional coin. The extra ball feature may either be disconnected or adjusted to increase or reduce the possibility of obtaining an extra ball. The machines also incorporate certain "game features" which afford additional methods of scoring replays. These "added attractions" are determined by an electrical system. The only control the player has over such features is by depositing additional coins which may or may not produce a given feature. The machines also house a device known as a "reflex unit." Although there was dispute as to its precise function, it appears that it more or less balances out the high winnings as against small winnings. That

is, the total replays will tend to be the same over a given period of time. The replays that are won are registered by an electrical scoring mechanism on the score board. The player has the choice of playing off the games won or of receiving money for them from the defendant. Each machine has a device called a replay meter housed behind a locked door next to the cash box inside the machine. When cash is paid for games won, the proprietor presses a cancellation button on the bottom of the machine which removes the games won from the scoreboard and registers them on the replay meter inside the machine. This serves as an accounting device which permits the collection man to determine the number of games paid for by the proprietor for the purpose of reimbursing him.

It is undisputed that on August 12, 1955, the defendant made cash payments to witness Annette L. Veit in the sum of \$1.00 for ten replays and to witness John M. Shannon in the sum of \$1.20 for twelve replays.

It is undisputed that on August 12, 1955, the meaning of 26 U. S. C. A. § 4462 (a) (2) and the intent of Congress in the enactment thereof expressly exclude the machines in question from the definition of gaming devices as set forth in that paragraph and that these machines are coin-operated amusement devices as defined in paragraph (a) (1) thereof.

The relevant portion of Section 4462 is as follows:

“§ 4462. Definition of coin-operated amusement or gaming device.

“(a) In general.—As used in sections 4461 to 4463, inclusive, the term ‘coin-operated amusement or gaming device’ means—

“(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

"(2) so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens."

Section 4462 (a) (2) lays down three requirements in defining a coin-operated gaming device: (1) it must be operated by means of the insertion of a coin or similar object; (2) the application of the element of chance must be involved by virtue of which, (3) the machine may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens.

It is the Government's contention that if a particular machine incorporates these three incidents it meets the definition of a coin-operated gaming device and consequently is subject to the gaming tax rate of \$250.00 for each such machine. The difficulty with this argument is that it overlooks the introductory language of paragraph (a) (2), *i. e.*, "so-called 'slot' machine."

If the dictionary definition of "slot machine" were applied, it is clear that these machines would be covered by the definition of coin-operated gaming device.

"A machine the operation of which is started by dropping a coin in a slot." Webster's New International Unabridged Dictionary, 2d Ed. 1955.

When this definition is considered with the choice of language employed by Congress, *i. e.*, "so-called 'slot' machine which operates by means of the insertion of a coin, token or similar object * * *," it would appear that Congress intended a more restrictive meaning for the term "slot machine." Otherwise,

there appears no purpose for the use of the language "so-called 'slot' machine."

The term "so-called" is a modifying word implying doubt as to the correctness or propriety of so designating a thing. See Webster's New International Unabridged Dictionary, 2d Ed. 1955. And the use of quotation marks to set off the word "slot" indicates that Congress did not intend the language "so-called 'slot' machine" to be as comprehensive as the dictionary definition of "slot machine." Every word used in a statute is presumed to have a meaning and purpose, and, if possible, every word must be accorded significance and effect. *Washington Market Co. v. Hoffman*, 101 U. S. 112; *Adler v. Northern Hotel Co.*, 7 Cir., 175 F. 2d 619. We conclude, therefore, that not only must these machines incorporate the three incidents noted above, but they must also be "so-called 'slot' machines."

Since the term "so-called 'slot' machine" is not adequately defined in Section 4462 nor elsewhere in the Internal Revenue Code, it becomes necessary to resort to extrinsic evidence in order to accord meaning and purpose to this language.

The defendant in urging this point suggests that the term "slot machine" as used in Section 4462 refers specifically to a machine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit (colloquially called a "one-armed bandit").

There is force to this conclusion when the language thus employed is used in light of the legislative history of Section 4462.

Before reviewing the legislative history of this statute it would be well to consider the argument ad-

anced by the Government that the statute is clear and unambiguous, and that consequently there is no necessity for looking behind the words of the statute in order to determine what the intent of Congress was. We do not believe, however, that these words are sufficient in and of themselves to determine the purpose of the legislation. In such an event "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use; however clear the words may appear on 'superficial examination'." *United States v. American Trucking Associations, Inc.*, 310 U. S. 534 at pages 543-44.

Sections 4461 to 4463 of the Internal Revenue Code were proposed by the House of Representatives of the 77th Congress. They were part of the Revenue Revision of 1941. As passed by the House a tax of \$25.00 was assessed on each "coin-operated amusement and gaming device." H. R. 5417, § 555. These devices were defined as:

"(1) so-called 'pin-ball' and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object, and

"(2) so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens."
[Emphasis added.]

The report of the Ways and Means Committee also indicates an intent to exclude pinball machines from the category of slot machines. The report stated: "'Coin-operated amusement or gaming devices' are, briefly, machines which fall within the general classification colloquially referred to as 'pin-ball' machines and 'slot machines'." H. R. Rep. No. 1040, 77th

Cong. 1st Sess. P. 60 (1941). The proposed bill, as subsequently passed by the Senate, apparently accepted the exclusion of pinball machines from the definition of slot machines, and reduced the tax on the former to \$10.00 per device and raised the tax on the latter to \$50.00 per device. The report of the Senate Finance Committee explained its proposed amendment as follows:

"The House bill places a special tax of \$25 per year upon each coin-operated amusement or gaming device maintained for use on any premises.

"Your Committee divides these devices into two categories. Upon *so-called pin-ball or other amusement devices* operated by the insertion of a coin or token, the tax is reduced to \$10 per year. Upon *so-called slot machines*, however, the tax is placed at \$200. per year." Sen. Rep. No. 673, 77th Cong. 1st Sess. P. 21 (1941). [Emphasis added.]

The House accepted the Senate amendments. See H. R. Rep. No. 1203, 77th Cong. 1st Sess. P. 18 (1941), and the bill as amended became law as Section 3267 of the Internal Revenue Code of 1939—Public Law 250, 77th Cong. 1st Sess.

Subsequent to the outbreak of war Section 3267 was amended. The original language of the House bill of 1941 was amended to read: "any amusement or music machine * * *." H. R. 7378, § 617. The purpose of the amendment was to enlarge the category of machines subject to taxation. It might be inferred that by dropping the term "pin-ball machine" from the definition of coin-operated amusement device Congress intended to treat such machines as gaming devices. However, in H. R. Rep. No. 2333, 77th Cong. 2d Sess. P. 180 (1942), it was stated:

"This section amends section 3267 of the Code by defining the term 'coin-operated amusement devices' to include all amusement machines and music machines operated by means of the insertion of coins, tokens, or similar objects. Under this amendment there will be included *in addition to pin-ball machines* a great variety of other machines, such as baseball and football games, machine-gun games, music machines (so-called juke boxes), and many other types of coin-operated games." [Emphasis added.]

See also Sen. Rep. No. 1631, 77th Cong. 2d Sess. P. 266 (1942), and Congressman Eberharter's statement made at hearings before the Committee on Ways and Means. Hearings, 83rd Cong., 1st Sess. P. 2517.

With the exception of increases in the rate of taxation and technical changes of form adopted in 1954, the provisions of Section 3267, as amended in 1942, remain unchanged as Sections 4461 to 4463 of the Internal Revenue Code.

Although the legislative history of Section 4462 does not clearly demonstrate the meaning and purpose which Congress intended to attribute to the language, "so-called 'slot' machine," it does indicate that Congress intended to exclude pinball machines from the category of gaming devices.

The Government, nevertheless, contends that these machines are coin-operated gaming devices which entitled winning players to receive cash. The Government cites state court decisions holding that machines similar to the ones here involved are gaming devices. See *People v. One Mechanical Device*, 9 Ill. App. 2d 38, 132 N. E. 2d 338; *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P. 2d 1113. However, these cases are inapposite for they concern the construction of local legislation which employ terminology quite different from that in Section 4462. Cf. Ill.

Rev. Stats. Ch. 38, § 342 (1955). The Government also cites *Johnson v. Phinney*, 5 Cir., 218 F. 2d 303, for the proposition that a pinball machine is a game of chance. The issue there arose out of the applicability of the wagering tax and is clearly distinguishable. Further, the question here is not whether pinball machines are gaming devices or games of chance; that they are may well be conceded. The question is rather: are pinball machines embraced within the term "so-called 'slot' machines." Congress has clearly indicated that they are not.

Statutes which relate to the same thing or same class of things are often helpful in construing a particular statute. See *Great Northern Ry. v. United States*, 315 U. S. 262.

The Johnson Act, passed on January 2, 1951, prohibits the interstate shipment of gambling devices which it defines as follows:

"(1) any so-called 'slot machine' or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon and (A) which when operated may deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

"(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property * * *." 15 U. S. C. A. § 1171.

If this definition were applied to the machines here involved it is clear that they are without its scope. A drum or reel with insignia thereon is not an essential

part of defendant's machines, nor are these machines designed and manufactured so that when operated they may deliver any money or property.

We have been referred to only two cases which have considered the question before us. *Tooley v. United States*, 134 F. Supp. 162; *United States v. One Bally Dude Ranch Coin-Operated Pin-Ball Machine* (Civil Action No. 1778, D. C. M. D. Tenn., Dec. 10, 1953). The *Tooley* case was an action for refund of a portion of special occupation tax paid for a certain coin-operated device known as the "Side-bottom Super Crane Machine." The court there did not consider the meaning of the term "so-called 'slot' machine," as used in the statute, but concluded that "the expression 'by application of the element of chance' as used in said section 3267 (b) (2) [predecessor to the statute here involved] merely requires that there be a substantial element of chance involved in the play of the machine, and does not require that the element of chance predominate over the element of skill."

The defendant has urged that since the play of a pinball machine involves a modicum of skill it is not a machine which "by application of the element of chance * * * may deliver, or entitle the person playing or operating the machine to receive cash * * *". In our view of the case we do not reach this question and voice no opinion thereon.

The *One Bally Dude Ranch* case, a forfeiture action, was on a motion for summary judgment. We have been informed that a hearing on the merits had been continued.

The Government concludes from two cases under the Johnson Act, 15 U. S. C. A. § 1171, that devices far removed from "so-called 'slot' machines," i. e., certain "digger" machines, have been held subject to the gaming tax. *United States v. 24 Digger Merchandising*

Machines, 8 Cir., 202 F. 2d 647, cert. denied 345 U. S. 998; *United States v. 10 Digger Machines*, 109 F. Supp. 825. However, the Johnson Act contains a broader definition of "gambling device" than the definition which we must interpret in the instant case.

Only one last point need be considered. The Government insists that Treasury Department regulations include pinball machines as gaming devices where unused free plays are redeemed, and such regulations are entitled to the force and effect of law. T. D. 5203, 1942-2 Cum. Bul. 276, 26 C. F. R. 323.22. But it is elementary law that a Treasury regulation which is inconsistent with a provision of the Internal Revenue Code has no force and effect. The Government, nevertheless, urges that these regulations have been in effect throughout subsequent amendments of Section 4462 and that it must therefore be assumed that the regulations have received Congressional approval.

We cannot assume on the facts of this case that Congress considered T. D. 5203 as stating the true construction of Section 4462 when it is shown that only of late has the regulation been followed. See *Casco v. Sterling Cider Co.*, 1 Cir. 294 Fed. 426.

We conclude that the pinball machines here involved are not gaming devices as defined in 26 U. S. C. A. § 4462 (a) (2).

For the reasons set forth above, the judgment of the District Court is reversed.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

Chicago 10, Illinois

Friday, September 28, 1956

Before

Hon. F. RYAN DUFFY, Chief Judge

Hon. H. NATHAN SWAIM, Circuit Judge

Hon. ELMER J. SCHNACKENBERG, Circuit Judge

No. 11669

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WALTER KORPAN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVI-
SION

This cause came on to be heard on the transcript of
the record from the United States District Court for
the Northern District of Illinois, Eastern Division,
and was argued by counsel.

On consideration whereof, it is ordered and ad-
judged by this court that the judgment of the said
District Court in this cause appealed from be, and
the same is hereby, REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF
MINNESOTA, THIRD DIVISION

No. 7980 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES B. HUNT AND GOPHER SALES COMPANY,
DEFENDANTS

No. 7988 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HAROLD A. OLLHOFF AND GOPHER SALES COMPANY,
DEFENDANTS

MEMORANDUM ORDER

These two proceedings are before the Court on defendants' motion in each case to dismiss the indictments herein on the ground that they "do not state an offense."

Mr. Ray G. Moorman and *Mr. Harry E. Ryan*, Minneapolis, Minnesota, appeared as attorneys for defendants in support of said motions, and *Mr. George E. MacKinnon*, United States Attorney, St. Paul, Minnesota, appeared as attorney for plaintiff in opposition thereto.

The indictments are substantially the same for present purposes. They charge the defendants with maintaining and operating within a certain place and

premises occupied by them "a so-called 'slot' machine of the pinball type, which operated by means of insertion of a five (5) cent coin and which by application of the element of chance did entitle the person playing and operating the machine to receive cash, premiums and merchandise from the defendants, and said defendants did then and there and in the manner aforesaid engage in and carry on a trade and business subject to tax imposed by the Internal Revenue Code of 1954, Section 4461 (2) * * * and Section 4901 * * * all in violation of the Internal Revenue Code of 1954, Section 7203."

The applicable statutes are as follows (all references are to the Internal Revenue Code of 1954):

§ 4461. IMPOSITION OF TAX

There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:

(1) \$10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);

(2) \$250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and

(3) \$10. or \$250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device.

§ 4462. DEFINITION OF COIN-OPERATED AMUSEMENT OR GAMING DEVICE

(a) *In general.*—As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means—

(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

(2) so-called "slot" machines which operate by means of insertion of a coin, token, or simi-

lar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

* * * * *

§ 4463. ADMINISTRATIVE PROVISIONS

(a) *Trade or business*.—An operator of a place or premises who maintains for use or permits the use of any coin-operated device shall be considered, for purposes of chapter 40, to be engaged in a trade or business in respect of each such device.

* * * * *

§ 4901. PAYMENT OF TAX

(a) *Condition precedent to carrying on certain business*.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

(b) *Computation*.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) *Now paid*.—

(1) *Stamp*.—All special taxes imposed by law shall be paid by stamps denoting the tax.

* * * * *

§ 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax or tax * * * who wilfully fails to pay such estimated tax or tax, * * * at the time or times required by law or regula-

tions, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

The gist of the issue in the instant cases is whether the "coin-operated gaming device" in question is an amusement device within the definition thereof in Section 4462 (a) (1), or a gaming device as defined in Section 462 (a) (2).

Considering a like motion made by defendants in eleven cases this Court, on February 29, 1956, refused to grant a dismissal, and in an accompanying memorandum, said:

"It is sound law that interpretation of statutes levying taxes should not permit implication to prevail above and beyond the clear import of the language used. Doubts in that respect are to be construed most strongly in favor of the defendants.' * * * I am not convinced at this posture of the case that the indictments go beyond the clear import of the language used in the applicable statutes."

On that occasion the Act quoted hereinbefore had not been interpreted by any binding appellate decision. Hence the Court's "judicial abstention"² from a holding that might be considered an unwarranted extension of the Act. On September 28, 1956, the Seventh Circuit Court of Appeals rendered a decision in point.

Stare decisis in the District of Minnesota must give way to a well-considered decision of a neighboring Court of Appeals that has reached an opposite holding

¹ *Gould v. Gould*, 245 U. S. 151, 153.

² *United States v. Five Gambling Devices*, 346 U. S. 441, 449.

³ *United States v. Korpan*, 7 Cir. — F. 2d —.

in a similar case.⁴ As so clearly pointed out by the Eighth Circuit Court of Appeals, "it is elementary" that not only must a strict construction be applied to a criminal statute, but it must also receive "a uniform construction". It is the manifest duty of a federal trial court to follow the decisions of such federal courts in other Circuits (if not clearly erroneous) who have met with and decided the point in question.⁵

The government, critical of the decision in the Korpan case, *supra*, contends that:

"The basic error committed in the Court's decision is that it attempts to construe by resort to legislative history 'clear' words in a statute. Then after importing the so-called legislative history it fails to properly understand it or apply it."

This reasoning is neither impressive nor persuasive.

The government has not convinced me that the Korpan decision is demonstrably wrong. In that case the Court, with customary clarity, discussing similar questions to those here in issue, emphasizes that logic and law oppose the viewpoint of the government in the instant case, in these words:

"Section 4462 (a) (2) lays down three requirements in defining a coin-operating gaming device: (1) it must be operated by means of the insertion of a coin or similar object; (2) the application of the element of chance must be involved by virtue of which, (3) the machine may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens."

⁴ *McDonald v. United States*, 8 Cir., 89 F. 2d 128, 134.

⁵ *Martyn v. United States*, 8 Cir., 176 F. 2d 609, 610. The Court of Appeals for the Eighth Circuit has not passed on the problem presented by the instant case.

"It is the government's contention that if a particular machine incorporates these three incidents it meets the definition of a coin-operated gaming device and consequently is subject to the gaming tax rate of \$250.00 for each such machine. The difficulty with this argument is that it overlooks the introductory language of paragraph (a) (2), i. e., 'so-called "slot" machine'.

"If the dictionary definition of 'slot machine' were applied, it is clear that these machines would be covered by the definition of coin-operated gaming device. 'A machine the operation of which is started by dropping a coin in a slot.' Webster's New International Unabridged Dictionary, 2d Ed. 1955.

"When the definition is considered with the choice of language employed by Congress, i. e., 'so-called "slot" machine' which operates by means of the insertion of a coin, token, or similar object * * *, it would appear that Congress intended a more restrictive meaning for the term 'slot machine'. Otherwise, there appears no purpose for the use of the language 'so-called "slot" machine'.

"The term 'so-called' is a modifying word implying doubt as to the correctness or propriety of so-designating a thing. See Webster's New International Unabridged Dictionary, 2d Ed. 1955. And the use of quotation marks to set off the word 'slot' indicates that Congress did not intend the language 'so-called "slot" machine' to be as comprehensive as the dictionary definition of 'slot machine'. Every word used in a statute is presumed to have a meaning and purpose, and, if possible, every word must be accorded significance and effect. *Washington Market Co. v. Hoffman*, 101 U. S. 112; *Adler v. Northern Hotel Co.*, 7 Cir., 175 F. 2d 619. We conclude, therefore, that not only must these machines incorporate the three incidents noted above, but they must also be 'so-called "slot" machines'.

"Since the term 'so-called "slot" machine' is not adequately defined in Section 4462 nor elsewhere in the Internal Revenue Code, it becomes necessary to resort to extrinsic evidence in order to accord meaning and purpose to this language.

* * * * *

"Although the legislative history of Section 4462 does not clearly demonstrate the meaning and purpose which Congress intended to attribute to the language, 'so-called "slot" machine', it does indicate that Congress intended to exclude pinball machines from the category of gaming devices."

* * * * *

To extend the term "slot machine" to the devices described in the indictments would be a perversion of the language used by Congress. When a rule of conduct is laid down in words that evoke in the average mind the definition set forth in Section 4462 (a) (2), *supra*, it requires a straining of the imagination beyond a reasonable point to include therein the pinball machines here involved."

The language adopted by Congress in said Section 4462 (a) (2) as interpreted by the Court of Appeals for the Seventh Circuit, points out an intent to expressly exclude the machines here in question from the definition of gaming devices, as set forth therein.

For the reasons above set forth, defendants' motions to dismiss must be granted.

IT IS SO ORDERED.

An exception is allowed to plaintiff in each case.

Dated this 6th day of November, 1956.

DENNIS F. DONOVAN,
United States District Judge.

* *McBoyle v. United States*, 283 U. S. 25, 27.

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U.S. SUPREME COURT

No. 11

In the Supreme Court of the United States

WILLIAM J. BROWN, Petitioner,

vs.

ON WRIT OF HABEAS CORPUS

WILLIAM J. BROWN, Respondent.

U.S. SUPREME COURT

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 596

UNITED STATES OF AMERICA, PETITIONER

v.

WALTER KORPAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES.

OPINION BELOW

The opinion of the Court of Appeals (R. 111-118) is reported at 237 F. 2d 676.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1956 (R. 119). On October 26, 1956, by order of Mr. Justice Burton (R. 119-120), the time for filing a petition for a writ of certiorari was extended to November 27, 1956, and the petition was filed on that date. The petition was granted on January 21, 1957 (R. 120). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a mechanical game, the operation of which involves the element of chance as the result of which the player may become "entitled" either to free plays or to money, is the type of gaming device which is subject to the tax imposed upon "so-called 'slot' machines" as that term is used, in 26 U. S. C. (Supp. III) 4462 (a) (2).

STATUTES AND REGULATIONS INVOLVED

The Internal Revenue Code of 1954, 26 U. S. C., Supp. III, provides in pertinent part:

SEC. 4461. IMPOSITION OF TAX.

There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:

(1) \$10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);

(2) \$250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and

(3) \$10 or \$250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. * * *

SEC. 4462. DEFINITION OF COIN-OPERATED AMUSEMENT OR GAMING DEVICE.

(a) *In general.*—As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means—

(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

(2) so-called "slot" machines which operate by means of insertion of a coin, token, or sim-

ilar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

(b) *Exclusion*.—The term “coin-operated amusement or gaming device” does not include bona fide vending machines in which are not incorporated gaming or amusement features.

(c) *1-cent vending machine*.—For purposes of sections 4461 to 4463, inclusive, a vending machine operated by means of the insertion of a 1-cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize of a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens, shall be classified under paragraph (1) and not under paragraph (2) of subsection (a).

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any * * * tax * * * who willfully fails to pay such * * * tax * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

The Slot Machine (Johnson) Act, 64 Stat. 1134, 15 U. S. C. 4471, provides:

As used in this Act—

(a) The term “gambling device” means

(1) any so-called “slot machine” or any

other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; * * *

Treasury Regulation 59, Section 323.22, as amended by T. D. 5203, 7 F. R. 10835, Dec. 22, 1942 (26 C. F. R. (1949 ed.) 323.22 (b)), provides:

* * * * *

Examples of machines which, when operated by means of the insertion of a coin, token, or similar object, are regarded as gaming devices for purposes of these regulations are:

(a) A "pin-ball" machine with respect to which unused "free plays" are redeemed in cash, tokens, or merchandise, or with respect to which prizes are offered to any person for the attainment of designated scores.

(b) A machine which, even though it does not dispense cash or tokens, has incorporated gaming features in the form of combinations of insignia on reels or drums.

STATEMENT

An indictment (R. 3) returned in the United States District Court for the Northern District of Illinois charged that during August 1955, the respondent maintained on his premises, known as Korpan's Landing, in Fox Lake, Illinois, certain coin-operated gaming devices as defined by 26 U. S. C. 4462 (a) (2) (*supra*, p. 2); that by reason of this act he became obligated to pay the \$250 special occupational tax on such devices imposed by 26 U. S. C. 4461 (2) (*supra*, p. 2); and that he willfully and unlawfully failed to pay such tax in violation of 26 U. S. C. 7203 (*supra*, p. 3). Respondent, having waived jury trial (R. 4), was found guilty by the court and sentenced to pay a fine of \$750 (R. 97). In convicting the respondent, the District Court found the machines were within the definition of Section 4462 (a) (2).

On appeal (R. 99-100), the Court of Appeals reversed, holding that the machines were not within Section 4462 (a) (2) even though they might be considered gaming devices since, in the court's view, the legislative history indicated "that Congress intended to exclude pinball machines from the category of gaming devices" (R. 116). The Court of Appeals regarded the Treasury Regulation, T. D. 5203 (*supra*, p. 4), under which the machines in question would be subject to the \$250 tax, as inconsistent with the statute (R. 118).

Pertinent evidence adduced at the trial may be summarized as follows:

Petitioner had on his premises three bingo or pinball machines (Gov. Ex. 3, 4, 5), bearing the names

"Bally Hi-Fi", "Bally Gaiety", and "Bally Variety" (R. 23, 41). These machines, manufactured by the same company, are operated on essentially the same principles (R. 56). The game, played on an inclined table, is started by the player inserting a dime which releases the first of the five balls to be shot into the machine by the plunger (R. 25, 45; 56-57). The plunger is calibrated with six or seven scored lines so that the player may gauge the intensity of his shots (R. 57). There are 25 holes on the playing board, and the object of the game is to get the balls in such holes as will light up a series of numbers on the back of the machine in a vertical, horizontal, or diagonal line, similar to bingo (R. 25, 56-57). By inserting additional dimes, the player has a possibility of increasing the odds or obtaining additional balls before starting the game (R. 25, 26, 66, 68). There are "game features", affording methods of obtaining replays determined by electrical current over which the player has no control except by depositing coins which may or may not produce the hoped-for result (R. 59, 62, 68-69). The machine has a "reflex unit" which more or less balances out high winnings against small winnings (R. 50, 62-63). A player may nudge the machine to get the ball in a certain hole (R. 59, 74), but if he pushes too hard it will light up a sign indicating a "tilt", and the game ends with no return of money (R. 50-51). When replays are registered on the electrical scoreboard, the player may then play additional games free, or be reimbursed for them in cash by the proprietor (R. 32, 79). Inside the machine is a replay meter which registers whether the

replays are played or cancelled. If the proprietor pays a player in cash for games won, he presses a cancellation or "knock-off" button on the bottom of the machine which removes the games won from the scoreboard and registers them on the replay meter (R. 36, 37).

On June 16, 1955, Internal Revenue agents asked respondent to exhibit his special stamp tax covering the coin-operated devices on his premises for the fiscal year ending June 30, 1955, and respondent did so. When asked if he had paid winners on these machines in either cash, merchandise, premiums, or tokens, respondent denied that he had done so. The agent explained to respondent that, if the machines were used as gaming devices he would have to purchase a \$250 stamp for each machine, and that, if he paid winners in cash or its equivalent without having purchased the stamps, he would be subject to civil and criminal penalties. Respondent indicated he understood all this (R. 15). The agent explained that the new fiscal year would begin on July 1, 1955, and that if on that date respondent had any gaming devices in operation on his premises he should file special stamp tax returns and pay \$250 for each such device (R. 16). On June 22, 1955, respondent filed with the District Director of Internal Revenue a tax return (Gov. Ex. 1) for five coin-operated devices for amusement purposes only, upon which the tax was \$10 for each for a \$50 total, covering the period from July 1, 1955, through June 30, 1956 (R. 9, 10-11, 92).

On August 12, 1955, respondent paid \$1.00 to Annette Veit for 10 replays and \$1.20 to John Shannon,

an undercover Internal Revenue agent, for 12 replays (R. 19-20, 28-30). Respondent admitted to Shannon that he recalled the advice in June 1955 about the obligation to purchase coin-operated gaming device stamps prior to paying for replays won on such machines; that he had been paying winners on these machines at the time the agent spoke to him and ever since; and that he had of his own free will made the \$1.00 and \$1.20 payments for replays to Annette Veit and to Shannon (R. 30).

On September 21, 1955, respondent paid to the Internal Revenue Service \$825, which included \$750 covering the three machines at \$250 each and a penalty of \$75 for late payment of the tax (Gov. Ex. 2; R. 93, 52-53; 11-12).

SUMMARY OF ARGUMENT

I

The machines here involved come within the literal terms of 26 U. S. C. 4462 (a) (2) subjecting them to the higher \$250 tax imposed by 26 U. S. C. 4461 (2). Section 4462 (a) (2) specifies three conditions under which a coin-operated "so-called 'slot' machine" is subject to the higher tax: (1) it must operate by insertion of a coin or similar object, (2) the application of the element of chance must be involved by virtue of which, (3) the machine must deliver, or entitle a winning player to receive, cash, premiums, merchandise or tokens. Respondent's machines fulfill these requirements.

1. It is undisputed that coins (dimes) have to be inserted in respondent's machines to begin the game,

for possible changing of odds, and for the receipt of additional balls.

2. A substantial element of chance is involved in operating respondent's machines—including the player's virtual lack of control over the ball after release of the plunger; absence of control over the selection of odds payable on winning sequences or added "game features"; and presence of the reflex unit assuring that the winnings paid will not be too great. Even the court below conceded that pinball machines "may well be conceded" to be "gaming devices or games of chance" (R. 117). Although it may be said that there was some slight degree of skill involved in the operation of respondent's machines, the chance element was clearly sufficient to categorize them as gaming devices. Cf. *Tooley v. United States*, 134 F. Supp. 162 (D. Nev.). A number of state decisions take the position that pinball machines, essentially similar to those here, are games of chance within gambling statutes, even though some element of skill may be present.

3. The evidence was undisputed that respondent had made cash payments to customers for free replays on his machines, and that he had admitted making such payments.

The error in the opinion below lies in its assumption that the use of the term "so-called 'slot' machines" in Section 4462 (a) (2) shows an intention to limit the section to a particular type of device, frequently colloquially referred to as a "one-armed bandit," even though the specific requirements set forth in the section are otherwise met. To the contrary, the use of

the word "so-called" before "slot machine" indicates that the word was intended to be generic, to cover coin-operated machines generally designed to be used or used for gambling purposes. Respondent's machines are really electronic descendants of the "one-armed bandits," and are completely different from pinball machines used solely for amusement purposes. They possess many features incorporated into the mechanism to be utilized for gambling purposes only. Moreover, since the true "one-armed bandits" dispense only coins (usually nickels, dimes, and quarters), if Congress had meant Section 4462(a) (2) to include only "one-armed bandits"; there would have been no necessity for adding, after "cash", the words "premiums, merchandise, or tokens". If Congress had intended so to limit its coverage, Section 4462 (c), exempting penny vending machines (with gaming features), from the purview of Section 4462 (a) (2), would also have been unnecessary.

It was not essential in order that respondent's machines be considered "so-called 'slot' machines" that payment be made by delivery of coins from the machines themselves, in lieu of payment by the proprietor for free replays. Cf. *United States v. Ansani*, opinion dated January 15, 1957 (C. A. 7). Prior to the incorporation of the "so-called 'slot' machines" definition into the Revenue Act of 1941 (55 Stat. 723), state court decisions had held that pinball machines designed for gambling were slot machines within the meaning of local gambling statutes. With the results of this litigation in the public domain, it is reasonable to believe that Congress used the term "so-called" in

relation to slot machines to cover exactly the type of device that is here involved, a coin-operated machine designed for gambling but differing from older types in order to appear more respectable. Congress manifestly intended the three specific features it enumerated in the statute to be controlling in determining the amount of tax. As we have shown, those requirements are indisputably met here.

II

The legislative history of 26 U. S. C. 4462 shows that Congress intended to tax pinball machines used for gambling, as distinguished from amusement purposes, at the heavier rate of \$250. The opinion of the court below is largely based on its interpretation of legislative history as showing that the definition of "so-called 'slot' machines" in 26 U. S. C. 4462 (a) (2) was not intended to include any form of pinball machine. The court has interpreted some equivocal words in various congressional reports without considering the problem to which these reports relate. Consideration of the history which led up to the reports, as well as of the statute, demonstrates that Congress intended to draw a distinction, not between pinball machines *per se* and the slot machines known as "one-armed bandits", but between machines with the primary function of amusement (a category which includes many pinball machines) and machines with the primary function of acting as a gaming device (including pinball machines operated as were the devices in this case). This legislative history also shows that all

gaming devices were to be subject to the heavier \$250 tax, whether they involved pins and balls or not.

1. The proposal to tax coin-operated machines was first made as part of the Revenue Act of 1941. The original bill, H. R. 5417, Section 555, defined coin-operated amusement and gaming devices as follows:

(1) so-called "pin-ball" and other similar amusement machines operated by means of the insertion of a coin, token, or similar object, and

(2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

As originally passed by the House, all coin-operated amusement or gaming devices would have been taxed at the same rate of \$25 per annum. The Senate Finance Committee Report, S. Rep. 673, 77th Cong., 1st Sess., Part 1, pp. 21, 55, proposed a \$10 per year tax upon "so-called pinball or other amusement devices operated by the insertion of a coin or token" and a \$200 tax upon "so-called slot machines". The congressional debates show that the purpose of the amendment was to distinguish between gambling machines and pinball machines played purely for amusement, and to differentiate between machines on the basis of their usage, and not their name or method of operation (87 Cong. Rec. 7298, 7301, 6476). As modified, the bill passed on September 20, 1941. 55 Stat. 722.

2. At the hearings before the Committee on Ways and Means of the House of Representatives on Reve-

nue Revision of 1942, 77th Cong., 2d Sess., industry representatives urged that the taxing of penny candy machines as gambling devices resulted, by reason of their small revenue-producing qualities, in driving them from operation and in loss of revenue to the government (Hearings, vol. 2, pp. 2278-2280, 2057-2058; vol. 3, pp. 2682-2688). Another industry complaint was that the Treasury Department, since February 1942, was interpreting the classification of machines as amusement or gambling by usage, *i. e.*, by whether prizes were obtained thereby, rather than by the physical characteristics of the machines. It was suggested that machines should be taxed upon the basis of their physical characteristics, and not their usage in the field (Hearings, vol. 2, pp. 2056-2057). Similar industry complaints were made in the Related Hearings before the Senate Committee on Finance, 77th Cong., 2d Sess., on H. R. 7378 (Vol. 1, p. 1133, 1135-1141).

As finally passed on October 21, 1942 (56 Stat. 978), Section 3267 (h) dropped clause (1), referring to "so-called 'pin-ball' and other similar amusement machines, etc.," and substituted for it, "any amusement or music machine operated by means of the insertion of a coin, token, or similar object". The exemption for penny-vending machines, which the industry had advocated in the hearings, was granted under certain designated limitations. Despite the emphatic industry complaints, however, that the Treasury Department's interpretation of the "so-called 'slot' machines" definition was erroneously based on usage instead of the machine's physical characteristics, no change in the

law was made in this respect. The reasonable inference is that Congress, satisfied with Treasury's viewpoint, saw no need to amend the law.

3. The Treasury Department's interpretation of the "so-called 'slot' machines" definition as dependent on whether premiums were returnable as a result of an element of chance was formally set forth in Regulations 59, Section 323.22, as amended by T. D. 5203, adopted December 22, 1942, and still in effect. The observation of the court below, that it could not "assume on the facts of this case that Congress considered T. D. 5203, as stating the true construction of Section 4462 when it is shown that only of late has the regulation been followed" (R. 118), is not correct. The Treasury Department in its rulings and enforcement policies as consistently adhered to T. D. 5203. The Department's position was publicized as early as 1942 in issues of "Billboard", the trade magazine of the coin-machine industry.

Congress was made aware of the Treasury Department's interpretation of the "so-called 'slot' machines" provision, as including pinball machines in which cash payments were made for free replays, during the hearings on the 1954 Internal Revenue Code. Proposals were made to amend Section 3267 to "make it clear that pinball and amusement machines are clearly within the \$10 classification", and that clause (b) (2) be amended so as to be identical with the definition of a "gambling device" as used in the Johnson Act in describing what are colloquially known as "one-armed bandits" (Hearings before House Committee on Ways and Means, 83rd Cong., 1st

Sess., on General Revision of the Internal Revenue Code, Part 4, pp. 2510, 2511; Hearings before Senate Committee on Finance on H. R. S. 300, 83rd Cong., 2d Sess., Part 4, pp. 1874-1879). Despite the explicit requests, however, of representatives of the pinball machine industry to amend the statute in the manner desired, Congress was not so persuaded. Again, the statute was reenacted without change in the pertinent definition of "so-called 'slot' machines", 68A Stat. 531. Since the administrative interpretation had been clearly and specifically pointed out to the congressional committees, this reenactment "bespeaks congressional approval". *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46, 53; *United States v. Allen-Bradley Co.*, 352 U. S. 306, 310.

ARGUMENT

I

THE MACHINES HERE INVOLVED FALL WITHIN THE LITERAL TERMS OF "SO-CALLED 'SLOT' MACHINES" IN 26 U. S. C. 4462 (a) (2) AND ARE THEREFORE SUBJECT TO THE \$250 TAX.

The machines here involved come within the literal terms of 26 U. S. C. 4462 (a) (2) (*supra*, p. 2) subjecting them to the higher \$250 tax imposed by 26 U. S. C. 4461 (2) (*supra*, p. 2). Section 4462 (a) (2) specifies three requirements for a coin-operated gaming device to be a "so-called 'slot' machine": (1) it must "operate by insertion of a coin or similar object", (2) the application of the element of chance must be involved by virtue of which, (3) the machine must deliver, or entitle the person playing or operating,

the machine to receive cash, premiums, merchandise or tokens if he wins. There is no dispute as to the fact that the machines in question meet these three definitional elements although respondent does argue that a player's skill plays a part.

1. For the operation of respondent's machines, the insertion of a coin in a slot is necessary. Insertion of dimes is required to begin the game, for the possible changing of odds, and for the receipt of additional balls (R. 16, 20, 24, 25, 26, 27-28, 47, 57, 68-69, 77).

2. There is a substantial element of chance involved in the operation of respondent's machines. This includes the player's lack of control over the ball (except nudging the machine, which involves the risk of "tilting") after release of the plunger (R. 28, 48); complete absence of control over the selection of odds payable on winning sequence, or added game features (R. 68-69, 71); and presence of the reflex unit assuring that the winnings paid will not be too great (R. 50). In the opinion of the government's expert witness, the possibility of winning was determined "predominantly by chance" (R. 51). The court below conceded that pinball machines "may well be conceded" to be "gaming devices or games of chance" (R. 117).

Although it may be said that there is some slight degree of skill involved in the operation of respondent's machines, the chance element is clearly sufficient to categorize them as gaming devices. In *Tighe v.*

³ This observation in *Johansen v. Johnson*, 218 F. 2d 304, 307 (C. A. 9), concerning pinball machines, in some respects similar to respondent's, correctly parallels the situation in the instant case. "No

United States, 134 F. Supp. 162 (D. Nev.); a machine, the operation of which consisted of attempts by the player to pick up with a boom and claw apparatus metal figurines entitling him to cash prizes, was held a "gaming device" within the predecessor of 26 U. S. C. 4462 (a) (2) and consequently subject to the higher \$250 tax. Among its conclusions of law, the court held (134 F. Supp. at 167):

The Court further concludes that the expression "by application of the element of chance" as used in said Section 3267 (b) (2) merely requires that there be a substantial element of chance involved in the play of the machine, and does not require that the element of chance predominate over the element of skill.

See also *United States v. 24 Digger Merchandising Machines*, 202 F. 2d 647, 650 (C. A. 8), certiorari 345 U. S. 998; *United States v. 10, More or Less, Digger Machines*, 109 F. Supp. 825; 827 (E. D. Mo.).

Again, habitually, a player who have studied a particular machine may attain a degree of proficiency in deciding the force to apply to the ball or in nudging the machine so that the ball is more likely to strike a particular bumper or fall into a particular hole; but even the most skillful player cannot "predetermined conditions and odds which are completely beyond his judgment and control."

A number of state decisions take the position that pinball machines essentially similar to those in the instant case are considered games of chance within gambling statutes, even though some element of skill may be involved. *V. g., Commonwealth v. Bowman*, 267 Ky. 602; *State ex rel. Gussault v. Kilburn*, 111 Mont. 100; *Shapiro v. Moss*, 281 N. Y. S. 72, affirmed, 270 N. Y. 609; *People v. One Pinball Machine*, 316 Ill. App. 161; *Hough v. City of Birmingham*, 220 Ala. 636, 670; *State ex Malin v. Livingston*, 135 Me. 323; cases n. 135 A. L. R. 146. And see *United States v. 19 Automatic Pay off Pin-Ball Machines*, 113 F. Supp. 230 (W. D. La.), holding that pinball machines which had been used for gambling

3. There was clear compliance with the third prerequisite that the machine must deliver, or entitle the player to receive, cash, premiums, merchandise, or tokens. Two witnesses testified that respondent had paid them in cash for free replays won on the machines (R. 19-20, 28-30), and respondent admitted having made such payments (R. 30, 39, 43).

The basic error in the opinion below lies in its assumption that, even though the listed elements of Section 4462 (a) (2) were met, the use in that section of the term "so-called 'slot' machines" requires its application to be limited to "one-armed bandits", machines which clearly fall within the definition of a gambling device in the Slot Machine (Johnson) Act, 64 Stat. 1134, 15 U. S. C. 1171 (a), (*supra*, p. 3). This ruling misconceives both the structure of the statute and the nature of the machines at issue.

These machines are indisputably "slot machines" as the dictionary defines that term. Webster's New International Dictionary, 2nd ed., Unabridged, defines "slot machine" as simply "a machine the operation of which is started by dropping a coin into a slot." By qualifying the term "slot machine" by the three other factors we have just discussed, Congress made it clear that only coin-operated machines which were used for gambling were to be covered by the \$250 tax, and not all coin-operated devices. The court below has read the statute as if the term "so-called

purposes before pay-off devices were removed were "designed and manufactured" as gambling devices within the Johnson Act prohibiting shipment of gambling devices in interstate commerce. See also *infra*, pp. 24-25.

"slot" machine" narrowed the category of machines subjected to the tax. We believe, on the contrary, that "so-called 'slot' machine" is broad—as the dictionary defines it—and that Congress added the three elements in order to restrict coverage to gambling devices. "So-called" is frequently used when one is referring to a term which may not be considered good literary style or accepted as the best English; "slot machine"—as meaning *any* coin-operated machine—may well fall into that class; Congress could therefore have employed "so-called" merely to indicate that it was using a colloquial or not-yet-standard phrase, and not at all for the purpose of designating a special and particular type of "slot machine," *i. e.*, a "one-armed bandit".

In adopting a limited interpretation of the section on the theory that the term "slot machine" refers to a particular type of slot machine, the court below also failed to give any weight to the addition of the words "so-called" as a means of avoiding a narrow trade use of the term in favor of a more general use. Webster's New International Dictionary, 2nd ed., defines "so-called" as "Commonly named; thus termed; * * *." Therefore, even if Congress was not using "slot machine" in its broad dictionary sense, the use of "so-called" would indicate an intention to give the term a general meaning rather than a limited technical meaning such as might be used by manufacturers or dealers. It might well have been added in an attempt to forestall the argument that the term "slot machine" has acquired a definite but restricted meaning.

There is internal evidence in other provisions of the section which support the conclusion that Congress intended the term to have a general interpretation. The "one-armed bandits" commonly seen in taverns, night clubs, bowling alleys, and beach resorts, dispense only coins (usually nickels, dimes, and quarters). If Congress had meant Section 4462 (a) (2) to include only "one-armed bandits", there would have been no necessity for adding, after "cash", the words "premiums, merchandise, or tokens". Additionally, if Congress had entertained such an intention, the provision in Section 4462 (c) exempting penny-vending machines (with gaming features) from the purview of Section 4462 (a) (2) would have been entirely unnecessary. Penny-vending machines are clearly not "one-armed bandits".

The use of the word "so-called", in this context shows that Congress intended to include machines of the type here involved; machines adapted for, and used for, gambling. Indeed, these machines not only meet the three gambling elements we have discussed, but have within them the elements of standard "one-armed bandits," namely rotating reels (R. 69-70), so that they may well be said to be slot machines under the Johnson Act. See *infra*, pp. 21-23. At the very least, they certainly fall within the class of "so-called 'slot' machines" in Section 4462 (a) (2), *i. e.*, machines adapted for and used for gambling which embody the three elements discussed above.

There is a vast difference between the machines here involved and a pinball machine really designed only for amusement purposes. Respondent's expert wit-

ness, Breither, did not even refer to the machines as pinball machines but stated that the generic term for them was "in-line games" and "bingo machines" (R. 80). He admitted that the odds-selecting rotary device on respondent's machines, except for the wire connections with the main device, was the same basic thing as a "one-armed bandit" (R. 69, 70). Respondent's machines are really electronic descendants of "one-armed bandits." Unlike amusement pinball machines, these devices have a replay meter inside to register replays, and a "knock-off" button to remove games won from the scoreboard on payment of cash and register them on the replay meter as though played (R. 47, 36, 37); a rotary device for determining the odds and game features which light up on the front of the machine (R. 67-68, 69); game features to afford additional chances of winning (R. 48, 69); a possibility of increasing the odds by depositing additional coins (R. 48, 66, 68); and a reflex unit to balance out high winnings against small winnings, and to vary the condition of the game features (R. 50, 62-63). All of these characteristics of respondent's machines are not present on regular amusement pinball devices, and were patently designed for only one purpose—gambling. None of these features has any relation to the pinball amusement aspects of the machine. The machines are therefore much closer to "one-armed bandits" than to pinball machines. They can properly be characterized as slot machines camouflaged as pinball machines.

The gambling features are so integral a part of these machines that we think they may well fall within

the definition of the Johnson Act, *supra*, p. 3. They have drums or reels with insignia thereon for scoring replays which are sufficiently an essential part of the machine to come within the definition of that Act. Even under the Johnson Act, it is not necessary that payments be made by delivery of coins from the machines themselves, in lieu of payment by the proprietor for free replays. Compare *United States v. Ansani*, opinion dated January 15, 1957 (C. A. 7), pending on petition for certiorari, No. 813, this Term, which involved illegal shipment in interstate commerce in violation of the Slot Machine (Johnson) Act (*supra*; p. 3) of a remote control device called a "trade booster" to be used in connection with regular slot machines. The court stated at page 3 of the slip opinion:

Defendants contend that a trade booster transforms a slot machine into a nongambling device for amusement only. They argue that after the slot machine has been altered in such a way that its slot is so obstructed as to prevent the insertion of a coin to activate it, and its pay-off mechanism has been removed, it is no longer a slot machine; and, therefore, a trade booster is not a subassembly or essential part of a slot machine. The difficulty with this argument is that it dwells on nonessentials and completely ignores the fact that after the trade booster is attached, the machine performs precisely the same function as an unconverted slot machine, *i. e.*, it is a machine or device "an essential part of which is a drum or reel with insignia thereon * * * by the operation of which a person may become entitled to receive, as the result of the application of an element of

chance, any money or property * * *." Section 1171 does not require that a slot machine be a coin activated device nor that winnings be delivered automatically. The statute is clear on these points for "gambling device" is defined as "any so-called 'slot machine' or any other machine or mechanical device * * * by the operation of which a person may become entitled * * *." A slot machine is not a gambling device merely because it has coin slots or an automatic pay-off mechanism. It is a gambling device because its function and design are to allow one to stake money or any other thing of value upon the uncertain event of achieving the winning combination of insignia.

See also *State v. Ricciardi*, 32 N. J. Super. 204, 208 (1954), for the view that a pinball machine which recorded free games on which cash pay-offs were made was a "slot machine or device in the nature of a slot machine" under a New Jersey statute making maintenance of such a device a misdemeanor. Accord, *Stafford v. Garrett*, 128 N. J. L. 623 (1942). But whatever the resolution of that question under the Johnson Act,¹ the relationship between these machines

¹The definition of the Johnson Act is not controlling in relation to the statute here involved since the history and purposes of the two statutes are different. The objective of the Johnson Act is to place an outright ban on shipment of the machines in interstate commerce, except to states which permit them. The aim of the instant statute is to raise revenue, as well as to discourage gambling. Congress could well have decided not to use its drastic power under the Johnson Act to prohibit machines of the kind used here from being shipped in interstate commerce while nevertheless regarding the machines as entirely capable of paying the higher tax which it imposed on gambling (as distinguished from amusement) devices.

and the admitted slot machines is clearly close enough to render them "so-called 'slot' machines" under Section 4462 (a) (2), as distinguished from true amusement devices taxed under Section 4462 (a) (1).

Prior to the time when the "so-called 'slot' machine" definition was first incorporated in the Revenue Act of 1941 (September 20, 1941; 55 Stat. 723), state court decisions had held that pinball machines used for gambling were "slot machines" within the meaning of local gambling statutes. In *Times Amusement Corp. v. Moss*, 160 Misc. 930, 290 N. Y. S. 794, affirmed, 247 App. Div. 771, 287 N. Y. S. 327 (1936), pinball machines made ready for operation by inserting a coin in a slot, and involving playing for prizes, were held to be machines having an element of chance in the determination of the outcome of their operation under a statute prohibiting slot machines in which the operation is unpredictable because of any element of chance. Accord, *People v. Gargiulo*, 298 N. Y. S. 951, 164 Misc. 39 (1937); *In re Mapakarakes*, 8 N. Y. S. 2d 826, 169 Misc. 766 (1938); *People v. Traver*, 11 N. Y. S. 2d 588, 171 Misc. 53 (1939).¹ In *State v. Coats*, 158 Ore. 122 (1938), a pinball machine was held to be a lottery under an Oregon gambling statute. The object of the game was to get the ball in one of eighteen holes. If successful, the player received an award greater than the nickel paid for playing, but if

¹New York cases of the same tenor subsequent to 1941 are *People v. Bitter*, 32 N. Y. S. 2d 176 (1942); *Sarag Vending Co., Inc. v. Valentine*, 33 N. Y. S. 2d 324, 178 Misc. 1 (1942); *People v. Fitzgibbons*, 33 N. Y. S. 2d 377 (1942); *People v. Whitcomb*, 79 N. Y. S. 2d 230, 273 App. Div. 610 (1948).

unsuccessful he received nothing. The court observed (at p. 133): "In our opinion, the pinball machine described in the information is a type or form of *slot machine* and must be judged by the law applicable to it" (emphasis added). In *Ex parte Davis*, 66 Okl. Crim. App. 271 (1939), and *Couch v. State*, 71 Okl. Crim. App. 223 (1941), pinball machines were held to be slot machines under an Oklahoma gambling statute. Other state cases decided prior to the Revenue Act of 1945 had shown no hesitancy in viewing pinball machines as gambling devices within gambling statutes and ordinances. *E. g.*, *Commonwealth v. Bowman*, 267 Ky. 602 (1936); *Milwaukee v. Burns*, 225 Wis. 296 (1937); *Spied v. Keys*, 110 S. W. 2d 1245 (Tex. Civ. App. 1937); *State of Maine v. Livingston*, 135 Me. 323 (1935); *State ex rel. Hassault v. Kilburn*, 111 Mont. 400 (1941); and see *Holladay v. Governor of State of South Carolina*, 78 F. Supp. 918, 924-925 (W. D. S. Car., 1948), affirmed, 135 F. S. 833.

This line of decisions, indicating a constant attempt by the industry to camouflage machines used for gambling as amusement devices and a constant refusal by the courts thus to permit evasion of gambling statutes, was presumably known to the committees in Congress concerned with this problem. Both state legislatures and courts had called the machines "slot machines." This tends to support the view that the language "so-called 'slot' machines" was written into the federal

*For similar Oklahoma cases subsequent to 1941, see *Prickett v. State*, 200 P. 2d 457, rehearing denied, 201 P. 2d 798 (Okl. Crim. App. 1949); *Autlin v. State*, 220 P. 2d 846 (Okl. Crim. App. 1950).

statute to cover the situation of these gambling machines camouflaged as amusement devices. Since the machines here involved meet the three additional conditions set forth in the section, they should have been held taxable under Section 4462 (a) (2).

II

THE LEGISLATIVE HISTORY OF 26 U. S. C. 4462 SHOWS THAT CONGRESS INTENDED TO TAX PINBALL MACHINES USED FOR GAMBLING, AS DISTINGUISHED FROM AMUSEMENT PURPOSES, AT THE HIGHER RATE OF \$250.

The legislative history of 26 U. S. C. 4462 (*supra*, p. 2) shows that Congress intended to tax pinball machines used for gambling, as distinguished from amusement purposes, at the heavier rate of \$250. The opinion of the court below is largely based on its interpretation of legislative history as showing that the definition of "so-called 'slot' machines" in 26 U. S. C. 4462 (a) (2) was not intended to include any form of pinball machine—even though the particular pinball machines might be within the literal terms of the statute, as we have developed in Point I, *supra*. The court has interpreted some equivocal words in various congressional reports without considering the problem to which these reports relate. Consideration of the history which led up to the reports, as well as of the statute, demonstrates that Congress intended to draw a distinction, not between pinball machines *per se* and the slot machines known as "one-armed bandits", but between machines with the primary function of amusement (a category which includes many pinball machines) and machines with the primary

function of acting as a gaming device (including pin-ball machines operated as were the devices in this case). This legislative history also shows that all coin-operated gaming devices were to be subject to the heavier \$250 tax.

1. The proposal to tax coin-operated machines was first made as part of the Revenue Act of 1941, and as originally passed by the House of Representatives would merely have taxed all coin-operated amusement or gaming devices at the same rate of \$25 per annum. The House Committee on Ways and Means Report, No. 1040, accompanying H. R. 5417, 77th Cong., 1st Sess., p. 60, stated: "Coin-operated amusement or gaming devices" are, briefly, machines which fall within the general classification colloquially referred to as 'pin ball' machines and 'slot machines'. The original bill, H. R. 5417, Section 555, defined coin-operated amusement and gaming devices as follows:

(1) so-called "pin-ball" and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object, and

(2) so called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens.

Under this act, no occasion would have arisen to distinguish between gambling devices and the ordinary pinball machine, since the tax was the same.

The Senate Finance Committee Report, S. Rep. 673, 77th Cong., 1st Sess., Part 1, p. 21, 55, proposed a \$10 per year tax upon "so-called pinball or other

amusement devices operated by the insertion of a coin or token" and a \$200 tax upon "so-called slot machines". Senator Clark of Missouri, the author of the amendment, stated (87 Cong. Rec. 7298):

The amendment came about * * * by reason of the fact that upon the recommendation of the Treasury Department the House Ways and Means Committee went into a new field of * * * taxation of slot machines, and proposed a levy of a flat tax of \$25 a year on all classes of slot machines, including the little pinball machines into the slot of which a man puts a nickel without any hope of recompense; without any premium, but merely to try his skill on such a machine, to see how many balls he can put past the various pins. A tax was also imposed on the various machines with which a man tries to play a baseball game, a football game, or some other kind of game, without any gambling element connected with it. But at the same rate the Ways and Means Committee included the so-called one-armed bandits, which are notoriously a racket. I refer to the machines with the lemons, plums, oranges, and what-not, which are notoriously gambling machines. Such machines were put in the same category in the tax bill.

* * * * *

Mr. President, it seemed to me and to a majority of the members of the Finance Committee that it was a disgrace to put all slot machines in the same class. Therefore we reduced the tax on the innocent slot machines, the ones which do not involve any gambling interest, from \$25 to \$10.

This statement indicates a purpose to distinguish between gambling machines and pinball machines played purely for amusement and to test the operator's skill. The following colloquy makes clear the intent to differentiate between machines on the basis of their usage, and not their name or method of operation (87 Cong. Rec. 7301):

Mr. CLARK of Missouri. The definition is perfectly plain. In lines 5 and 6 is this provision:

(1) \$10 per year in the case of a device defined in clause (1) of subsection (b):

Subsection (b) reads in part:

Definition: As used in this part, the term "coin-operated amusement and gaming devices" means (1) so-called pin-ball and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object.

Referring now to line 17:

(2) so-called slot machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

Mr. President, clause 2 of subparagraph (b) *certainly takes out from the operation of clause (1) any machine which returns any sort of a premium, and that was the intention of the amendment, and it was the intention of the committee in adopting it.*

Mr. BARKLEY. Mr. President, let me ask the Senator a question.

Mr. CLARK of Missouri. I shall be glad to answer, if the Senator from Nevada will yield.

Mr. McCARRAN. I yield.

Mr. BARKLEY. It refers to a "coin-operated amusement or gaming device", and under clause No. 1 it is still necessary to put in a coin in order to operate the machine.

Mr. CLARK of Missouri. There is no question about that.

Mr. BARKLEY. What does one get for the coin?

Mr. CLARK of Missouri. He does not get anything except the pleasure of playing the game.

Mr. BARKLEY. He has the pleasure of putting the coin in without the chance of getting anything back?

Mr. CLARK of Missouri. Yes.

Mr. BARKLEY. Under clause 2 there is a chance to get something back. That is the difference?

Mr. CLARK of Missouri. That is the difference between any sort of an ordinary amusement, for instance, riding on a chute-the-chute and playing the roulette wheel. The Senator has stated the difference just as well as it could be stated.

Mr. BARKLEY. In the case of the roulette wheel, I do not think there is a chance of getting anything back.

Mr. CLARK of Missouri. Nor do I, but very few people play the roulette wheel without the hope of getting something back. The Senator from Kentucky has precisely stated the difference between amusement and gambling, as well as it could possibly be stated by a corps of experts after months of testimony. [Emphasis added.]

In the House debate, Congressman Treadway, after referring to the definition of coin-operated amusement or gaming devices, stated (87 Cong. Rec. 6476): "In other words, it is the gambling outfit we are trying to hit. * * * This particular paragraph would only apply where the person putting the money in the slot gets something in return, either money, a prize, or something else, as a gambling proposition."

The conference report of H. R. 5417 (H. Rep. 1203, 77th Cong., 1st Sess., p. 18) describes the final bill as follows:

Amendment No. 147: The House bill imposed an occupational tax of \$25 per annum with respect to the operation of a pin-ball game, a slot machine, or similar amusement or gaming device. The [Senate] amendment establishes two different rates of tax; \$10 per annum in the case of a pin-ball game, or similar game or amusement machine, and \$50 with respect to so-called slot machines, the operation of which involves an element of chance; and the House recedes.

Thus, although the terms "pinball" and "slot machines" were carried over from the House bill, the purpose was to classify as pinball machines devices used purely for amusement purposes, and to place in a different tax category other pinball machines used (as were the respondent's machines) for gambling purposes involving the element of chance. As modified, the bill passed on September 20, 1941. 55 Stat. 722.

2. In the spring of 1942, at the Hearings before the Committee on Ways and Means of the House of

Representatives on Revenue Revision of 1942, 77th Cong., 2d Sess., various industry spokesmen voiced objections to the tax laws regarding coin-operated machines. A recurring complaint was that offered on behalf of the penny-candy machines, which dispensed additional merchandise prizes by chance. It was urged that the taxing of these as gambling devices resulted, by reason of their small revenue-producing qualities, in driving them from operation and in loss of revenue to the government (Hearings, vol. 2, pp. 2278-2280, 2057-2058; vol. 3, 2682-2688). Another complaint was that the Treasury Department, since February 1942, was interpreting the classification of machines as amusement or gambling by usage, *i. e.*, by whether prizes were obtained thereby, rather than by the physical characteristics of the machines. One industry representative suggested (Hearings, vol. 2, pp. 2056-2057):

Machines should be taxed on the basis of their physical characteristics and not upon the basis of their usage in the field.

* * * if the tax is to be determined from a usage basis rather than from the physical properties of the game itself, the Government and the Internal Revenue Department are going to be involved in a policing problem rather than the collection of revenue. * * * I believe that the law was written not with the view of policing the morals of our people, but strictly on a revenue-raising basis. Moreover, our various States have conflicting statutes as to what is or shall be construed as gaming. I, therefore, urge that the raising of revenue from this in-

dustry can be accomplished successfully and without confusion on the basis of taxing the machine for its physical properties regardless of its usage.

At the related Hearings before the Committee on Finance, United States Senate, 77th Cong., 2d Sess., on H. R. 7378, similar complaints were made as to the inequities of so construing the tax laws that the operators of penny-vending machines would be driven out of business (Vol. 1, pp. 1135-1141). Regarding the proposal to tax machines according to their physical characteristics rather than their usage, a representative of the coin machine manufacturers made this significant statement (Vol. 1, p. 1133):

I appear before you with regard to the proposed section 617 relating to coin-operated amusement and gaming devices. * * * As the present tax provision now exists and even as amended to section 617, coin-operated devices are classified according to usage instead of the more simpler [sic] and fairer method of being classified according to their physical characteristics.

Taxing by usage creates both loopholes and a policing problem for the Internal Revenue Bureau. Such a method also puts a premium on tax evasion, whereas, taxing on the physical characteristics of each machine is direct, definite and leaves no room for differences of opinion as to tax classification.

This industry spokesman also observed, "The taxing provisions as they now stand attempt to make a distinction between games of chance and games of pure

amusement, but make no distinction as to the degree of chance which in turn affects the ability of the machine to pay the tax imposed" (Vol. 1, p. 1134).

As finally passed on October 21, 1942 (56 Stat. 978), Section 3267 (b) dropped clause (1) referring to "so-called 'pin-ball' and other similar amusement machines, etc.," and substituted for it, "any amusement or music machine operated by means of the insertion of a coin, token, or similar object", in order to enlarge the category of machines subject to taxation.* The tax rate on gambling devices was increased from \$50 to \$100. The exemption for penny-vending machines, which the industry had advocated in the hearings, was granted under certain designated limitations. However, despite the emphatic industry complaints that the Treasury Department's interpretation of the "so-called 'slot' machines" definition was erroneously based on usage instead of the machine's physical characteristics, no change in the law was made in this respect. The reasonable conclusion to be drawn is that Congress, satisfied with Treasury's viewpoint, saw no need to amend the law.

3. The Treasury Department's interpretation of the "so-called 'slot' machines" definition as dependent on

* H. Rep. 2333, 77th Cong., 2d Sess., p. 180, referring to Section 617 of H. R. 7378, states: "This section amends section 3267 of the Code by defining the term 'coin-operated amusement devices' to include all amusement machines and music machines operated by means of the insertion of coins, tokens, or similar objects. Under this amendment there will be included in addition to pin-ball machines a great variety of other machines, such as baseball and football games, machine-gun games, music machines (so-called juke boxes), and many other types of coin-operated games."

whether premiums are returnable as a result of an element of chance was formally set forth in Regulations 59, Section 323.22, as amended by T. D. 5203, adopted December 22, 1942 (*supra*, p. 4). This regulation is still in effect under Section 7807 of the 1954 Internal Revenue Code. The observation of the court below, that it could not "assume on the facts of this case that Congress considered T. D. 5203, as stating the true construction of Section 4462 when it is shown that only of late has the regulation been followed" (R. 118), is not correct.⁷ The regulation has been in force for over fourteen years and has been consistently followed during that entire time.

In the special-tax return Forms 11-B (Revised March 1947 and Feb. 1952; Def. Ex. 1, 2; R. 94, 95), the blanks for payment of the higher tax on both forms refer to "Coin-operated GAMING DEVICES (slot machines and *all other machines involving element of chance*)."⁸ (emphasis added). This language gives notice to persons required to purchase such stamps that the Internal Revenue Service does not in-

⁷ So far as we can ascertain, the only basis for this assertion was a reference by respondent in his brief below at page 41 to an inconsistent interpretation in 1951 by a Collector of Internal Revenue at Indianapolis. This appears to be an isolated and mistaken interpretation entirely inconsistent with the rulings being issued from the Commissioner's office both to Collectors and taxpayers. Insofar as a search of the files shows, T. D. 5203 has been consistently followed by the Commissioner from the date of its issuance. The respondent can gain no support from interpretations, which he also cites in his brief below at pages 42-43, dealing with prizes paid to winning competitors in games of skill. Nor would a weekly prize for a high score on a pinball machine be comparable to the use made of the machines here.

interpret the gaming machine license tax as limited to certain types of machines; rather, it embraces all coin-operated machines involving the element of chance, including, of course, pinball machines used for gambling purposes.*

It is also significant that, as early as 1942, issues of the magazine "Billboard", the trade publication of the coin machine industry, made pinball machine owners aware of the Treasury Department position. For instance, in the issue of July 11, 1942, the following appeared:

The federal tax situation was made more serious for locations and operators by the fact that Internal Revenue collectors began to enforce on a much larger scale the increased fee on free-play games in which the free plays were redeemed over the counter. This collection of \$50 on such games compelled operators to think seriously about the coming year. Many reports indicated that a lot of free-play games would be removed from locations if they had to pay a \$50 tax.

And in the issue of October 10, 1942, this statement was made, in speaking of pending legislation before the Senate:

* On Def. Ex. 1 is a reference to "Coin-operated AMUSEMENT DEVICES (pinball and all other amusement or music machines)", requiring the \$10 tax. On Def. Ex. 2, the word "pinball" is deleted and the matter in parentheses has been changed to read "any amusement or music machines" (this change had been previously made in Form 11-B in September 1950). The revision is of no particular significance.* Even after the change, a pinball machine used solely for amusement (as distinguished from one involving the element of chance or gambling) would be an "amusement" machine subject only to the lower \$10 tax.

Reports indicated that the Internal Revenue Bureau had refused to change its very adverse ruling that free-play games must pay a \$50 tax when the location redeems free plays. This is one of the most serious points at issue, and the penny counter gaming device is the second point at issue. The free play question seemed to surmount all other issues.

4. Congress was made aware of the Treasury Department's interpretation of the "so-called 'slot' machines" provision, as including pinball machines in which cash payments were made for free replays, during the hearings on the 1954 Internal Revenue Code. At that time, an industry representative (Hearings before House Committee on Ways and Means, 83rd Cong., 1st Sess., on General Revision of the Internal Revenue Code, Part 4, pp. 2505-2522) stated that, under the legislative history of the existing statute, pinball machines were not taxable in the same category as slot machines (*id.*, p. 2506); that the tax was upon the machines themselves and not upon the use to which they were put (*id.*, pp. 2507-2508); that a \$250 federal tax on pinball machines would virtually drive their operators out of business,⁹ and interfere

⁹ Collection of the higher \$250 tax on pinball machines used as gaming devices has not driven their owners out of business, as predicted by industry spokesmen. We have been advised by a memorandum of October 12, 1956, from the Assistant Commissioner (Operations) of Internal Revenue that in the fiscal year 1956 the receipts from pinball machines used as gaming devices amounted to an estimated \$3,500,000. This memorandum further advises that, if the decision of the court below is affirmed, this annual revenue of \$3,500,000 will be lost; that refund claims totaling that amount or more may be anticipated; and that approximately 500 pinball machines seized will have to be returned.

with 'local governments' need for further revenue (*id.*, pp. 2509-2510). He proposed an amendment to Section 3267 to "make it clear that pinball and amusement machines are clearly within the \$10 classification", and that clause (b) (2) be amended so as to be identical with the definition of a "gambling device" as used in the Slot Machine (Johnson) Act, 64 Stat. 1134, 15 U. S. C. 1171 (*supra*, p. 3), in describing "one-armed bandits" (*id.*, pp. 2510, 2511). This was the hearing at which Congressman Eberharter, in speaking of the legislative history of Section 3267, stated, "What we intended was to tax one-armed bandits \$250" (*id.*, p. 2517). At this same hearing, however, Congressman Byrnes observed (*id.*, p. 2520): "I can see also, though, where even if you take the perfectly innocent pinball machine and the manager turns it into a gambling device, which he can do, if that is what he is using it for, I presume he should pay the tax on the same basis as the other gambling machines that he has." Congressman Eberharter did not take issue with this observation.

At the hearings before the Senate Committee on Finance on H. R. 8300, 83rd Cong., 2d Sess., Part 4, pp. 1874-1879, another industry spokesman advanced essentially the same arguments made in the House hearings. Included, as before the House, was a specific suggestion that Section 3267 (b) (2) be amended so as to be identical with the "gambling device" definition of the Johnson Act directed against the "one-armed bandits".¹⁰

¹⁰ Requests by industry spokesmen at both the House and Senate hearings to amend Section 3267 (b) (2) so as to make it identical

Despite these well-delineated and explicit requests of representatives of the pinball machine industry to amend the statute in the manner desired by them, Congress was not persuaded. Again, the statute was reenacted without change in the pertinent definition of "so-called 'slot' machines". 68A Stat. 531.¹¹ Since the administrative interpretation had been clearly and specifically pointed out to the congressional committees, this reenactment "bespeaks congressional approval". *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46, 53; *Helvering v. Wimmill*, 305 U. S. 79, 83; *Boehm v. Commissioner*, 326 U. S. 287, 291-292; *Parker Pen Co. v. O'Day*, 234 F. 2d 607, 609-610 (C. A. 7).¹² See also *United States v. Allen-Bradley Co.*, 352 U. S. 306, in which it was held that the War Production Board had authority under

with the "gambling device" definition of the Johnson Act disclose a desire on their part that paragraph (b) (2) include only the "one-armed bandits". Congress failed to follow this suggestion. From this it would seem reasonable to infer that the court below was ill-advised in using the Johnson Act definition (R. 117) as an analogy, even though we also take issue with the conclusion that these machines do not fall within the Johnson Act (see, *supra*, pp. 20, 21-22).

¹¹ The tax rate on gaming devices which had been increased to \$250 in 1951 (65 Stat. 528) was retained.

¹² *Casey v. Sterling Cider Co.*, 294 Fed. 426 (C. A. 1), relied upon by the court below after stating that it could not assume Congress considered T. D. 5203, as stating the true construction of Section 4462 when it was shown that only of late had the regulation been followed (R. 118), is clearly distinguishable from the instant case. In *Casey* the regulation had been in effect only nine months when the new statute was enacted and there was no showing that it had been consistently enforced and acquiesced in. The court, moreover, did not regard the new statute as a reenactment of the old one without substantial change (294 Fed. at 429).

§ 124 (f) of the 1939 Internal Revenue Code to issue certificates that only a part of the cost of essential wartime improvements was necessary to the national defense. In considering the history of administrative regulations authorizing the practice, this Court stated (at p. 310):

It appears that Congress kept close supervision over the certification program and the special authorization privilege. For example, § 124 was amended five times during the war; two of these amendments altered § 124 (f) itself in a manner which did not affect the language decisive to the present controversy. But no attempt was made to restrain the administrators from issuing certificates covering only a part of the cost of necessary facilities, *although it seems apparent that responsible committees of Congress were aware that § 124 (f) had been consistently interpreted and applied by the certifying authorities as permitting them to issue such certifications.* [Emphasis added.]

The legislative history of the statute thus discloses a consistent intent by Congress to regard pinball machines used for gambling purposes (such as respondent's machines) as subject to the higher tax (\$250). It is significant that, when industry representatives sought an exemption from the higher tax for the penny-vending machines, Congress granted this relief, but refused to exempt pinball machines used for gambling purposes. It is a reasonable assumption that Congress was of the impression that the operators of the penny machines could not afford

to pay the higher tax, but that operators of pinball machines used for gambling purposes could well afford to and should do so.

The congressional purpose was correctly and consistently reflected in the Treasury regulation T. D. 5203 (*supra*, p. 4), in effect since 1942, making pinball machines subject to the higher tax as gaming devices if they are used for gambling purposes in redeeming "free plays" in cash, tokens, or merchandise, or in the granting of prizes for designated scores. The industry representatives were well aware of that interpretation and attempted to reverse that ruling by legislation. In each instance, however, Congress did not amend the "so-called 'slot' machines" definition in Section 4462 (a) (2) (*supra*, p. 2). It follows that, in all probability, Congress intended that pinball machines used for gambling purposes should pay the higher \$250 tax under Section 4461 (2) (*supra*, p. 2). Certainly as to the type of machines here involved, which have features adapted only for gambling unrelated to the amusement aspects, it would be a negation of the congressional purpose to hold that they were not taxable as gambling devices.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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MARCH 1957.

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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 596

UNITED STATES OF AMERICA, PETITIONER

v.

WALTER KORPAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The respondent argues in Point III of his brief (pp. 41-43) that the government did not at the trial prove a *willful* failure to pay the tax. The basis for this argument is that the application of Section 4462 of the Internal Revenue Code of 1954 to the type of machine in operation on respondent's premises had not been adjudicated and is still in dispute. The respondent now contends that, because of the existence of this legal issue and because of the asserted failure of the Internal Revenue Service to enforce the tax with respect to this type of machine, the failure to pay the tax cannot be deemed willful. In support of this proposition, he cites *United States v. Murdock*, 290 U. S. 389, and *United States v. Kahriger*, 210 F. 2d 565 (C. A. 3).

In the *Murdock* case, the defendant had refused to supply information to the Bureau of Internal Revenue as to the persons to whom he claimed to have made payments which were listed as deductions in his return. His refusal was based on a claim of self-incrimination because of the possibility of prosecution under state laws. In *United States v. Murdock*, 284 U. S. 141, this claim was overruled. The defendant went to trial before a jury. The trial judge refused to instruct the jury that, if the refusal to give the information was made in good faith on the basis of an actual belief that the protection of the Fifth Amendment applied, the defendant could not be found guilty of a willful refusal to answer. This Court found that this was error, holding that a person could not be held criminally liable for willful failure to comply if he acted pursuant to a *bona fide* misunderstanding as to his liability (290 U. S. 389, 396).

Following this holding, the United States Court of Appeals for the Third Circuit held in *United States v. Kahriger*, 210 F. 2d 565, that; where a refusal to register as a gambler and to pay the occupational tax was similarly based upon a mistaken claim pursuant to the Fifth Amendment, there was no basis for a finding of willfulness. In that case the failure to pay the tax was directly related to the refusal to register since it was stipulated that the Collector would not permit the payment of the tax in the absence of registration (210 F. 2d 565, 567).

These two cases are inapplicable to the present case both on a factual and a legal basis.

1. In both *Musdock* and *Kehriger*, the defendants' refusals to comply with provisions of the Internal Revenue Code were, at the time of the refusals, specifically based on claims of privilege under the Fifth Amendment. Mistaken though these claims proved to be, they were the explicit basis for the defendants' action. Here, in contrast, the government proved, and the trial court found, a *willful* failure to pay the tax in the sense that the respondent stated that he understood that the tax was applicable to him and yet failed to pay it. There was no evidence whatsoever of a claim by respondent at the time of the offense that the tax was not applicable to the machines involved. That issue was later injected into the trial as a defense, but no evidence was introduced that such was the actual reason for the failure to pay the tax.

The evidence shows that, before the commencement of the tax year involved, the respondent was visited by a special agent of the Intelligence Division of the Internal Revenue Service who warned him that if he used the machines as gaming devices he would be subject to the \$250 tax (R. 13-15). The respondent denied that he was making cash payments on the machines and stated that he understood the requirements as explained to him (R. 15). Other witnesses then testified that, later, they won replays on the machines which the respondent redeemed in cash (R. 18-20; 28-29). The special agent who uncovered the violation, after warning respondent of his right to remain silent, asked him whether he had been told of the interpretation of the Act, whether he understood his obligation, and whether he had been paying out cash

all along (R. 30). The respondent admitted that he had received the instructions and understood them, and that he had been paying cash at the time he denied it (R. 30). Thereafter, the respondent paid a \$250 tax on each of the three machines and a penalty of \$75 for late payment (Gov. Ex. 2, R. 93). The respondent did not claim at the time the offense was called to his attention, nor has he since asserted, that he did not pay the tax because he thought it was not applicable to him. To be sure, his counsel has argued, and still does, that the tax does not apply to these particular machines, but he has presented no evidence that the failure to pay was based on that belief.

We submit that this is a very different factual situation from that present in *Murdock* or *Kahriger* where the refusal to comply was, at the time of the refusal, directly related to the legal issue in dispute.

2. There is also a clear legal distinction between *Murdock* and *Kahriger* and this case. In those cases, the normal way, and in fact the only way, the defendants could have protected themselves against self-incrimination, if they had in fact any rights in that respect, would have been to refuse to give the information and to refuse to file the registration form. If their belief that they were entitled to the privilege had been justified, their rights would have been lost if

they had made the required disclosures, whether or not they had attempted to reserve their legal rights. Here, on the contrary, the proper way for the respondent to protest the tax was to pay the tax and then petition for a refund (26 U. S. C., Supp. III, 7422). Even if he had been right that the tax was not applicable, his remedy was not to refuse to pay.

The proper interpretation of the term "willful" as it is used in the statute making the willful failure to pay a tax a misdemeanor was explained by this Court in *Spies v. United States*, 317 U. S. 492 at 497-499. There, the Court distinguished between a positive attempt to evade taxes, which was made a felony, and "willful but passive neglect" which was made a misdemeanor. Cf. *United States v. Illinois Central Railroad Co.*, 303 U. S. 239, 243; *Boyce Motor Lines v. United States*, 342 U. S. 337, 340.

Here, instead of a defendant protecting what he considers to be his constitutional rights, we have an individual, who has been warned as to the application of the law to his situation, attempting through concealment to avoid the tax. Even if he should eventually be upheld in the interpretation his attorney now urges, concealment of his operations and a flagrant disregard for his apparent obligation was not the appropriate method of protecting his right.

For these reasons, we urge that respondent's argument that the government failed to establish a willful failure to pay is without merit.

Respectfully submitted.

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APRIL 1957.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 596

UNITED STATES OF AMERICA,

Petitioner,

vs.

WALTER KORPAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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**RESPONDENT'S BRIEF IN OPPOSITION TO PETI-
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UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

STATEMENT.

The respondent, Walter Korpan, respectfully requests that the petition for a writ of certiorari filed by the petitioner in this Court on November 27, 1956, be denied.

The Court of Appeals for the Seventh Circuit, in holding that the use by Congress of the well-known term "so-called 'slot' machine" in a taxing statute did not intend to include the equally well known "pinball machine", was confirmed in its opinion by a lengthy and uniform legislative history.

The petitioner's statement of the question presented is not entirely accurate in that it assumes that the pinball

machine considered by the Court of Appeals is a "gaming device" and that its "operation * * * involves the element of chance" whereas the Court of Appeals specifically stated that "in our view of the case we do not reach this question and voice no opinion thereon" (App. A of Petition, p. 25; see also, p. 24).

The correct question presented is:

"Whether a pinball machine is subject to the tax imposed by 26 U. S. C. (Supp. III) 4461(2) upon 'so-called 'slot' machines' as defined in 26 U. S. C. (Supp. III) 4462(a)(2)."

REASONS FOR DENYING THE WRIT.

1. The petitioner's statement regarding "estimated" loss of revenue is purely speculative. It may more accurately be stated that a conclusion different than that reached by the Court of Appeals would destroy the pinball machine industry and result in loss of revenue for the reason that an amusement game is economically unable to bear the annual \$250 tax and the stigma attached thereto whereas the result of the interpretation of the statute announced below will increase Federal revenue through a greater volume of payments of the annual \$10 tax. It must be assumed that Congress was exercising its power to tax and not the power to destroy.

This Court has never announced that one of the considerations in granting or denying a writ of certiorari is the volume of "criminal convictions" and "forfeitures" obtained under the prior erroneous interpretation of a statute.

2 (a). The Court of Appeals examined and considered the legislative history of the taxing statute in great detail

and quoted extensively from Congressional committee reports (App. A of Petition, pp. 21-23), which are, as a rule of statutory interpretation, to be given greater weight than the statements of individual Congressmen on the floor of Congress. *United States v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U. S. 310 at 318; *Lapina v. Williams*, 232 U. S. 78 at 90; *Jefferson v. United States*, 178 F. 2d 518 at 520, aff'd. in 340 U. S. 135; *Nicholas v. Denver and Rio Grande Western R. Co.*, 195 F. 2d 428 at 431; *Gan Seow Tung v. Carusi*, 83 F. Supp. 480 at 481.

However, an examination of debate on the floor of Congress in its full context merely serves to strengthen the result reached by the Court of Appeals. The petitioner quotes a portion of the debate which occurred in the Senate on September 4, 1941 (87 Cong. Rec. 7297; Petition, pp. 8-10). At this time the House of Representatives had passed a bill which would have taxed "so-called 'pin-ball' and other similar amusement machines" at the same rate as "so-called 'slot' machines" (H. R. 5417, Section 555; H. R. Rep. No. 1040, 77th Cong., 1st Sess., p. 60). The Senate Finance Committee had thereafter recommended that the devices be divided into two categories with a \$10 annual tax upon so-called pin-ball or other amusement devices and a \$200 annual tax upon so-called slot machines (Sen. Rep. No. 673, 77th Cong., 1st Sess., pp. 21, 75).

On the same day, September 4, 1941, that the language quoted in the petition was uttered, Senator Clark of Missouri and other Senators made other statements which clearly reinforce the opinion of the Court of Appeals. In order to understand some of the references, it is necessary to recognize that the term "slot machine" has two separate and distinct meanings. In one sense, it refers to any machine equipped with a slot for the reception of coins. In this broad sense it includes food and drink vending

machines, cigarette dispensers, pay telephones, turnstiles, parking meters, automatic phonographs and the variety of amusement games found in a penny arcade, none of which are embraced by the term used in the statute. In the advancing age of automation the ordinary citizen has daily contacts with a host of such "slot machines." This meaning is obscure and seldom-used.

The second meaning of the words "slot machine" is a narrow one. It refers specifically to a machine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit. The operator has absolutely no control over the combination in which the insignia cease rotating and such combination determines whether the operator merely loses the coin he inserted or whether he wins additional coins in varying numbers. If coins are won, they are released from the machine and drop into a receptacle where they may be claimed by the operator. Because this type of machine is operated by a single handle and because the odds of the operator winning are so slight, it has been colloquially called a "one-armed bandit." This is the common, ordinary meaning of a "slot machine."

The following statements were made during the Senate debate on September 4, 1941:

"Mr. Clark of Missouri. * * * But at the same rate the Ways and Means Committee included the so-called one-armed bandits, which are notoriously a racket. I refer to the machines with the lemons, plums, oranges, and what-not, which are notoriously gambling machines. Such machines were put in the same category in the tax bill.

"But in the same category were also included the 'one-armed bandits', which have been a racket in every State of the Union except the very few States in which

they have been legalized—in my opinion, to the disgrace of those States.

“Then, Mr. President, I am proud to say that on my motion the tax on the ‘one-armed bandits’ was increased from \$25 to \$200.” 87 Cong. Rec. 7298.

“Mr. Bailey. * * * The purpose of the amendment is to bring about the prohibition of gambling through the ‘one-armed bandits’ or to bring an end to robbery through the ‘one-armed bandits’.” 87 Cong. Rec. 7298.

“Mr. Clark of Missouri. * * * Almost universally in the lowest-income brackets the poorest people send children to the grocery store to buy groceries, and they are attracted by the prospect of return from these—two lemons or two oranges, or two prunes, or whatever they may be.” 87 Cong. Rec. 7300.

“Mr. Clark of Missouri. * * * The House provision proposes to raise the same rate of revenue from ‘one-armed bandits’ as from the little, innocent pinball machines.” 87 Cong. Rec. 7300.

“Mr. Clark of Missouri. * * * I am frank to say that my purpose in offering in the Finance Committee the amendment imposing a tax of \$1,000 on slot machines was to make the rate absolutely prohibitive, and put these ‘one-armed bandits’ out of business.” 87 Cong. Rec. 7300.

The pinball machine considered by the Court of Appeals is not a one-armed bandit and it does not have lemons, plums, oranges and prunes.

The separate taxes imposed by Sections 4461-63 are placed on the coin-operated machines themselves, not on the use to which the machine may be put. If two players of a pinball machine decide to gamble on the results of

their play, the machine is not thereby converted into a gambling device. A pinball machine cannot be transformed into something else merely by the award of nominal prizes for the attainment of high scores, or the payment of cash in lieu of additional amusement. The machine remains the same. It is still a device whereby one or more balls are propelled through a chute by the operation of a plunger in the hands of the player, with the ball then registering a score by hitting various bumpers or other objects or by dropping into holes and actuating electrically controlled circuits. The redemption of unused free games by the location owner does not mysteriously transform the machine into one containing insignia on reels or drums. The game of golf also embodies an element of chance and may be made the subject of a wager, but it does not cease to be golf merely because players place nominal bets upon the outcome of a particular game. The pinball machines involved herein could not have been converted into slot machines solely by reason of a wager made by two or more players upon their respective abilities to attain a given score. They could not be so converted by anything done or not done by the proprietor.

If it were possible to convert a pinball game into a "so-called 'slot' machine" through its use, it would be possible to likewise transform any coin-operated amusement game into a slot machine, which not even the Treasury Department has ever contended.

Therefore, there is nothing in the Revenue Act of 1941 or in the committee hearings or reports or in the Senate debate which casts any doubt upon the correctness of the Court of Appeals decision. In fact, all of the pertinent material enforces and strengthens the construction adopted by the Court of Appeals.

(b) In the Revenue Act of 1942, the \$10 annual tax on "so-called 'pin-ball' and other similar amusement ma-

chines" was extended to "any amusement or music machine." But the enlargement of the category of machines subject to the \$10 tax did not remove pinball games from that classification. In H. R. Rep. No. 2333, 77th Cong., 2d Sess., p. 180, it was stated:

"Under this amendment there will be included *in addition to pin-ball machines*, a great variety of other machines, such as baseball and football games, machine-gun games, music machines (so-called juke boxes), and many other types of coin-operated games."

(c) The re-enactment by Congress of the language of Section 4462(a)(2), referring to "so-called 'slot' machines," in the Internal Revenue Code of 1954, has no significance inasmuch as the language of the Treasury regulation (Petition, pp. 3-4) was, until recently, never enforced by the Treasury Department itself and, in fact, specific rulings (R. 89-91) and forms (R. 12, 94-5) issued by the Treasury Department followed the construction eventually placed upon the statute by the Court of Appeals. The Court of Appeals said in its opinion that "it is elementary law that a Treasury regulation which is inconsistent with a provision of the Internal Revenue Code has no force and effect" and "only of late has the regulation been followed" (App. A to Petition, p. 26).

3. The Slot Machine (Johnson) Act, 64 Stat. 1134 (1951), 15 U. S. C. 1171-1177, is the only other Federal statute employing the words "so-called 'slot' machine" and that act clearly limits those words to the conventional one-armed bandit "an essential part of which is a drum or reel with insignia thereon." The Johnson Act is merely incidental support of the interpretation of the Court of Appeals which is based primarily upon the language of Section 4462(a)(2) and its legislative history.

Conclusion.

For the reasons stated, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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December 21, 1956.

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JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, *Petitioner.*

v.

WALTER KORPAN

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

**MOTION OF D. GOTTLIEB AND CO. FOR LEAVE TO
FILE BRIEF AS AMICUS CURIAE, AND BRIEF.**

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MARCH 14, 1957

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, *Petitioner*

v.

WALTER KORPAN

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE.**

This review turns on the application of a two-rate federal excise tax (Internal Revenue Code of 1954, 26 U.S.C., Sections 4461-2) levied on coin-operated devices in the two categories "amusement" and "gaming." These devices are complicated in structure and lend themselves to endless variation in design. But within the industry which produces them the features distinguishing the two categories are well known.

The movant, D. Gottlieb & Co., is a leading producer of non-gaming amusement devices of a type commonly known as "pin-ball" machines. The machines involved in the instant review also incorporate "pin-ball" features, though they are more commonly known as "bingo" or "in-line"

machines and contain structural elements which mark them unmistakably as gaming devices.

Movant respectfully prays leave to file the appended brief (with consent of the Solicitor General but over the opposition of respondent Korpan) for the following reasons:

First, neither the Solicitor General nor respondent Korpan, who is a beach-resort proprietor, is likely to develop fully the technical distinctions, well known to the coin-machine industry, by which amusement- and gaming-type devices are separable. Whatever the outcome of this appeal, the Honorable Court would be well served in having before it a brief analysis, by a responsible manufacturer such as movant, of the evolution of these devices and the structural features (repeatedly alluded to in the record below) which determine their gaming or non-gaming character. In this capacity movant respectfully volunteers as a true friend of the Court.

And secondly, movant has a direct interest in two propositions that appear to be developing in the instant proceeding: (1) that the statutory phrase "so-called 'slot' machines," describes only a few almost-extinct varieties of an old drum-and-reel gaming device known in the trade as "bell" machines, thus excluding all later modifications and variants from the gaming category; and (2) that "a pin-ball machine the operation of which involves the element of chance as the result of which the player may become entitled *either to free plays* or to money" is a gaming device. (Quotation, with emphasis added, is from Statement of the Question in petitioner's Petition for a Writ of Certiorari, p. 2). If the first of these propositions were affirmed, gaming devices would be admitted wholesale to the more favored amusement-device tax category, subjecting movant's products to unfair and possibly fatal competition. If the second were affirmed, movant's own devices, by reason of their free play feature, would be transferred to the penalized gambling-device category, with similarly disastrous results.

Movant believes, and desires to urge before the Court, that both these propositions are erroneous.

Wherefore it is respectfully prayed that leave be granted to file the appended brief as *amicus curiae*.

Respectfully submitted,

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No. 596

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, *Petitioner*.

v.

WALTER KORPAN

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

**BRIEF OF D. GOTTLIEB AND CO., AS
AMICUS CURIAE**

ARGUMENT

Respondent Korpan's key argument appears to be that Congress intended only to tax one narrow class of gaming device at the \$250 rate (controlled by the definition in Section 4462(a)(2), 26 U.S.C.), thus necessarily consigning all the rest, whether gaming or not, to the more favored amusement-device category and the \$10 rate (controlled by the definition in Section 4462(a)(1), 26 U.S.C.). Petitioner will assuredly meet this argument by offering a study of

pertinent legislative history. Besides, the statutory language (Sections 4461-2, 26 U.S.C.) virtually compels recognition of a broader dichotomy, referring throughout to coin-operated *amusement or gaming* devices; and respondent will be hard put to obliterate this phrase in favor of his exotic contention that all else must fall before the four words "so-called 'slot' machines."

But it is also deemed important by this *amicus curiae* that, from the practical view of those familiar with coin-operated machines, no distinction *except between "amusement" and "gaming" types* has ever been intelligibly drawn or effectively enforced. Through the years, efforts by a host of lawmakers to classify these machines according to appearance or subordinate elements (e. g., degree of skill, cash pay-offs, presence of a "drum" or "reel", end use to dispense merchandise, etc.) have been promptly frustrated; each labored description has merely evoked new waves of camouflaging gimerackery from segments of the industry whose resourcefulness in this respect seems boundless.

This *amicus curiae* believes Congress wisely chose to lay the line simply and unequivocally between the classifications "amusement" and "gaming" in Sections 4461 and 4462. It hopes petitioner will prevail upon this Honorable Court to affirm that the line lies there, and to reject the emasculating distortion urged by respondent. To this end it will respectfully argue that the machines in question do *not* avoid the gaming category, that they cannot be identified with the amusement category they seek to simulate, and that respondent's effort to equate so-called "slots" with so-called "one-armed bandits" is at variance with all known terminology and usage within the coin-machine industry. In conclusion, reference will be made to a test of "gaming" suggested by the petitioner, based on one element only, namely, the award of free plays, with a plea that this suggestion be either clarified, or else rejected and disregarded, in the consideration of this case.

Point I

The so-called bingo machines presented to the Court in this case are also "so-called 'slot' machines," basically identified with the "slots" of fifty years ago, allowing only for improvements and camouflaging innovations.

Coin-operated amusement and vending machines were commonplace in the United States during most of the Nineteenth Century—nickelodians, penny scales, gum-ball and candy-ball devices, and various equipment of the "arcade" variety. The first coin-operated *gambling* machines of commercial importance were developed by Charles Fey, of San Francisco, and Herbert Stephen Mills, of Chicago, around the turn of this century. These were "bell" or "bell-fruit" machines, and they and their progeny also came to be known as slot gambling machines, slot machines, or merely "slots." See, Anno.: 132 A.L.R. 1004 (1941).

All the non-gambling machines which preceded the inventions of Fey and Mills performed two characteristic functions: they received the consideration from the patron (ordinarily by the deposit of a coin) and they controlled the consideration returned to the patron (usually by delivering something to him, allowing him to make use of the machine in some way, or rendering him some service). The Fey-Mills machines had a third characteristic function: they also received the consideration from the patron (now, the player); and controlled the return, *but they introduced the element of chance, so the return was not the same for each successive operation of the machine.* For many years the chance was determined, in typical machines, by a set of three visible, spring-operated drums or reels, which paid off when certain combinations of symbols came into alignment. This was the notorious "one-armed bandit," which "put commercialized gambling on a five-cent basis and made gambling easily accessible to the general public."* Illus-

* Anon., "Slot Machines and Pinball Games," 269 Annals of the American Academy of Political Science 62 (May, 1950).

trative trade-journal material describing this basic device is gathered in Appendix A, Exhibits A-1 through A-4, at pages 1 through 4.

Substituting the coin-receiving 'slot' for the human dealer, croupier, or bookmaker of conventional gambling was a stroke of genius that brought golden returns and founded a substantial industry: "No other machine was ever invented from which the profits derived were so fabulous on so small an investment, and with so little effort."

And though slot machines have gone through many surface mutations since the first models, they have never departed from any of the three characteristic functions that mark them as "gaming" devices. All, from Fey's "Liberty Bell" to the three complex models whose nature is at issue in the instant case, must necessarily (1) control the receipt of consideration from the player, (2) bring an element of chance into play, and (3) control the pay-off of return consideration, i.e., winnings. Congress could scarcely have chosen clearer language than it used to describe these functions in the very statute whose application is now in question (Section 4462(a)(2), 26 U.S.C.):

"... machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens."

The trade-journal material gathered in Appendix B, Exhibits B-1 through B-20, at pages 5 through 24, illustrates the major steps in the evolution of the "one-armed bandits" and their transformation into today's "bingo" or "in-line" machines.

A. *The mint-vender* (Appendix B, Exhibit B-1)

The earliest subterfuge was an attachment, added in the pre-World-War-I era, which delivered a packet of candy or gum with each play. It was argued in many court tests that

* Ibid.

this alteration converted the machine into a *bona fide* vending machine by assuring at least some return for each coin deposited, i. e., divorcing the return consideration from the element of chance. See, *City of Moberly v. Deskin*, 169 Mo. App. 672, 155 S.W. 842 (1913); *State of Rhode Island v. Certain Gambling Instruments*, 46 R. I. 347, 128 Atl. 12 (1925); *Boynton v. Ellis*, 57 F. 2d 665 (C.A. 10, 1932). Cf., *Dacies v. Mills Novelty Co.*, 70 F. 2d 424 (C.A. 8, 1934). Anno.: 81 A.L.R. 177 (1933); 135 A.L.R. 141 (1941).

B. *Ticket, check and token pay-offs* (Appendix B, Exhibits B-1, B-6)

Where repressive legislation focused on cash payments, the industry early developed physical substitutes for cash—paper or metal counters emitted by the machine and which could be redeemed by the location owner or, in later models, replayed through the coin chute.

C. *Merchandise pay-offs* (Appendix B, Exhibits B-2, B-3)

Also to avoid the cash-payment ban, a variety of machines were developed which paid off directly in merchandise, most frequently cigars, cigarettes or tobacco. See, *Lang v. Merwin*, 99 Me. 486, 59 A. 1021 (1905). In some versions, the machines awarded mint packets like those used in the mint venders, *supra*, with the added feature that various colored packets would serve as counters for cash redemption by the location owner.

D. *"Skill" attachments* (Appendix B, Exhibit B-4)

From time to time the courts accepted the argument that pay-offs were allowable if governed, even in part, by some test of skill besides the element of chance. See, *Rouse v. Sisson*, 190 Miss. 276, 199 So. 777 (1941); *Centreville v. Burns*, 174 Fenn. 435, 126 S.W. 2d 322 (1939). This encouraged a rash of attachments and superficial embellishments. See *Hoke v. Lawson*, 1 A. 2d 77, 175 Md. 246 (1938). Anno.: 135 A.L.R. 138 (1941).

E. *The console and table models.* (Appendix B, Exhibits B-4, B-5)

After the development of bona fide amusement devices in floor-standing console and table models, the slots also appeared in console and table versions. In some instances this mere change in housing enabled the gaming units to penetrate areas where the traditional counter-size models had been eliminated.

F. *"Flashers" and internal chance-determining components.* (Appendix B, Exhibits B-5, B-6, B-18)

Following the advent of electrification, in the early 'thirties, a major development occurred: the visible drum-and-reel component disappeared and the same function of chance selection was performed by a power-driven combination of contact wheels and wiper fingers, often connected to lighting circuits that caused the machine to "flash" as the electro-mechanical determinations were made. This permitted the essential gaming element of chance-determination to be built into virtually any kind of coin-operated machine.

G. *"In-line" machines.* (Appendix B, Exhibits B-6, B-7)

To avoid the opprobrium of the bell-fruit-bar symbols, while yet retaining the operation of matching line-ups, the industry turned to familiar "keno" and "bingo" number arrangements, which made their appearance in many forms. Other symbols were also substituted, e. g., words, animals, cigarette brands, etc.

H. *Adaptation of the pin-ball feature* (Appendix B, Exhibits B-7, B-8, B-9)

As will be more fully developed under Point II, below, a bona fide amusement-machine industry began to flourish in the early 'thirties in the manufacture of pin-ball games. These were permitted where gaming machines had been outlawed; it was natural, therefore, that the gaming varieties would emerge in a large number of pin-ball guises,

and this they did. Simultaneously, the situation was confused by the manufacture of pin-ball games which awarded cash pay-offs for the achievement of high scores, touching off a series of skill-vs.-chance decisions. See, Anno.: 135 A.L.R. 104, 149-157 (1941). But the clearer evil was the machine which combined mechanical chance selection (by the unit described in "F", above) with some kind of subterfuge pin-ball play.

I. *Multiple coin chutes* (Appendix B, Exhibits B-8, B-11)

To enhance the odds and increase the operator's return, a multiple coin chute was added to some machines, permitting the deposit of several coins prior to each play.

J. *Free games and the "knock-off button" or "replay meter."* (Appendix B, Exhibit B-12).

In the late 'thirties an important innovation in the amusement-device field was followed promptly by a clever adaptation of the same mechanism to the gaming machines: a free-replay device was developed, connected to the coin chute so that pin-ball players making high scores could re-activate the machine and play off games awarded to them without any intervention by the location owner*; in the gambling adaptation this same free-replay circuit was connected to a button permitting free games to be "knocked off" without being played, and a meter, locked inside the machine, was added to record the number of free games thus taken off by the button. The result was that *once again*

* The coin-machine industry is universally divided into four vertical categories: the *manufacturer*, who sells his product outright for cash or short-term credit; the *distributor*, who is a wholesaler, buying from the manufacturer and selling, often on long-term credit, to the *operator*, who owns, operates, and services a number of machines; and the *location owner*, the pharmacist, barkeeper, restaurant-proprietor, etc., on whose premises the machines are actually made available to the public, on a percentage-split basis with the operator. Location owners almost never own their own machines, because of the required capital outlay, servicing problems, and the fact that machines lose their novelty and grow "stale" in a few weeks at one location.

the machine could control the pay-off of winnings, for the meter served as a fool-proof accounting system with the location-owner. He paid the money, for games he "knocked off," from his till; but the machine kept a record by which he could be exactly reimbursed when its earnings were divided. This was as accurate and effective as checks, tokens, tickets, colored mints—or letting the machine itself spit coins in payment of winnings.

K. Multiple play feature (Appendix B, Exhibits B-12, B-13)

A refinement of the multiple coin chutes ("I," above) was achieved by equipping the machines to take several coins, one after the other, each automatically changing the play conditions, e. g., giving higher odds, etc., before the actual play was commenced. A refinement of *this* was then achieved by putting a "flasher" or mechanical chance selector (described in "F", above) into each circuit so each additional coin might, or might not, give the player higher odds or other advantages. Thus, in effect, the player could play several old-fashioned drum-and-reel operations, each for a coin, before using the play feature of the machine at all.

L. The advent of the "one-balls." (Appendix B, Exhibits B-11, B-12 through B-15)

In the 'forties the gambling-device industry flooded the country with machines which came to be known as "one-balls" because they featured a pin-ball or roulette-type table on which the player shot a single ball—after playing one or more coins through one or more chance selectors (described in "F", above) to set the odds, etc. For all its altered appearance, this variation was essentially identical in operation with the old "one-armed bandit." Shooting the single ball was as mechanical, and nearly as unimportant to the play, as pulling the old-fashioned spring lever arm. The one-ball machines usually paid off in "free games," adapted to cash payouts by the knock-off button

and replay meter (described in "J", above). They caused much litigation, and dominated the gaming coin-machine field in the post-war years. See, *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P. 2d 1108 (1941); *People v. Gravenhorst*, 32 N.Y.S. 2d 760 (1942).

M. *Multiple board feature.* (Appendix B, Exhibits B-6, B-7, B-16, B-17, B-19, B-20)

The only innovation since the one-balls is essentially a return to the use of five balls again, plus much-increased complexity; the player may extend the possible effects of each play by depositing additional coins to bring more than one board, or playing section, into operation and to activate other "game features." This usually increases the absolute amount the machine may pay, as for instance, from \$4-for-10c to \$24-for-60c, rather than the odds themselves.

N. *Score adjuster or reflex unit.*

Gambling-adapted machines usually contain electrical switches, keys or circuit breakers which can be manually adjusted to make them pay off with more or less frequency. Recently, an electro-mechanical device known as a "reflex unit" has been developed and installed in some of these machines to make this adjustment continuously and automatically. A series of "wins" will cause the unit to reduce the hidden odds (circuits on the chance selectors) against which the player is playing; a long period of few wins will cause the unit to reverse and activate more circuits. Amusement-type machines never contain these units, which are complex, expensive, and quite unnecessary where no pay-offs are to be made.

O. *Current versions: the "bingo" and "in line" machines.* (Appendix B, Exhibits B-17 through B-20).

In 1951 Congress enacted the Johnson Act (64 Stat. 1134, 15 U.S.C. 1171-1177), which seriously disrupted the distribution of identifiable drum-and-reel machines. Efforts were also made, sometimes successfully, to apply the Act to "one-balls," which had by this time saturated the field. See,

United States v. 19 Automatic Pay-Off Pin Ball Machines, 113 F. Supp. 230 (D. C. La., 1953). So the gaming-machine industry turned to the new "five-ball" machine, known in the trade as "bingo" or "in-line." It is among the fastest "action" machines ever produced, for it has all the following features: it is a table model resembling the bona fide amusement pin-ball games ("E", "H", above); it contains several chance selectors ("F", above) which control odds and "game" features that permit multiple play by the deposit of several coins before each operation ("K", above); it incorporates the multiple board feature ("M", above); it contains the automatic reflex unit ("N", above); and it pays off by the fool-proof, hard-to-detect "free game" method controlled by a "replay meter" ("J", above). It is noteworthy that the "knock-off button" is no longer physically present. An ingenious circuit arrangement removes (and records) the free games whenever the plug-connection for the machine's power supply is removed from its wall socket.

* * * * *

The foregoing enumeration covers most of the principal steps in the development of gaming machines, though the list could be extended.* A recent development, now plaguing enforcement authorities, is the remote control "trade booster," a mechanism designed to take the place of the coin chute, installed away from the machine so the location owner can collect the player's deposit and push a button or throw a switch to start the play—from which it is argued that this version cannot offend public policy or endanger public morals because it is not "coin operated." See, *United States v. Asani*, 138 F. Supp. 454 (N. D. Ill., 1956), aff'd, C.A. 7, Jan. 15, 1957, pending on petition for certiorari, *Milner v. United States*, No. 813, October Term, 1956.

If the gaming machines now before the Court are not

* The "tilt" device referred to in the record below is common to all pin-ball machines of both gaming and amusement types. It simply turns the operative mechanism off when the machine is tipped (to prevent players from rolling the balls backwards up the board) or struck (to prevent damage to the machine).

"so-called 'slot' machines," where did they depart their ancestral line? Was it in substituting the multiple play feature for the old-fashioned spring handle? Or the replay-meter subterfuge for the pay-out mechanism that used to spit winnings in jingling coins? Or was the alchemy achieved when visible reels disappeared in favor of discs and wiper fingers concealed beneath the disarming simulation of a pin-ball table?

Slot machines are coin-operated gaming devices, a plain classification that began with the "one-armed bandit" and has grown apace with each succeeding development in the field. See, *People v. Gravehorse*, 32 N. Y. S. 2d 760 (1942). Anno.: 38 A.L.R. 73 (1925); 135 A.L.R. 104, 138-164 (1941). In 1941, Congress was surely addressing itself to the slot machines of 1941, not those of 1900. And now the Government properly urges an identical application of the same phrase to the slot machines of 1956 and 1957. This amicus curiae respectfully supports the Government's position, unqualifiedly, on this important point.

Point II

Amusement pin-ball machines are clearly distinguishable from their gaming counterparts, and are not "so-called 'slot' machines," even though coin operated.

Responsible manufacturers of amusement-type machines do not claim overbearing social worth for their products. The games they market—primarily pin-ball games—give harmless amusement and diversion, for a very modest consideration. They please their patrons, momentarily, perhaps, by providing an animated, somewhat challenging test of luck and skill, which is its own reward and which makes no appeal to the so-called gambling urge. They own to serving human idleness. But they do not exploit human weakness.

The pin-ball game may fairly stand for judgment in the company of juke boxes, soap operas, county fair concessionaires, comic books, B-minus movies, and the merchan-

disers of slightly toxic substances like tobacco. In such company these devices hold their own. What injures them undeservedly is their perennial identification with the gaming-device industry and the unsavory twilight zone of illegal gambling. And as noted in the argument under Point I, above, confusion in this respect is sometimes deliberately fostered.

The coin-operated pin-ball game is no relation of the gambling slot machine; it has a different forbear, the Victorian parlor game "bagatelle," and it appeared on the scene a quarter of a century after the drum-and-reel slots had made their profitable mark. The first pin-balls (also called "marble" games) were marketed about 1930 and were simple, inexpensive counter playthings aimed at penny revenues. (See Appendix C, Exhibit C-1). The devices were popular, and by 1933 they had appeared in a table-top version (Appendix C, Exhibits C-2, C-3), followed by the development of battery-powered lights and sound effects and a rudimentary back-board or light box (Appendix C, Exhibit C-4). A few years later the light box was developed to incorporate score indicators and other novelty features (Appendix C, Exhibits C-5, C-6).

In the late 'thirties, as has been noted, a bona fide free game mechanism was developed, connecting the score indicator directly to the coin chute so that players making high scores could be awarded one or more free games directly and automatically—to be played off immediately by working the chute to reactivate the machine. See, *Chicago Patent Corporation v. Genco, Inc.*, 124 F. 2d 725 (C.A. 7, 1941). This was the innovation which was promptly converted, by the gaming-machine manufacturers, by the addition of a "knock-off button" and "replay meter," into a subterfuge to control pay-offs on their products. (See Point I, "J," supra, p. 11). But it also remained as a feature of the non-gaming types. A practical difference, noteworthy in passing, is that the bona fide amusement machines never award more free games than can, within reason, be actually played off—25 at the maximum and more usually 10

or 5; while the gaming-adapted varieties are usually built to award any number up to the limit of three digits, i.e., 999.

In subsequent developments, while the one-ball and bingo gaming machines retained comparatively simple play boards (Appendix B, Exhibits B-18, B-19, B-20), the amusement types became more and more complex, with genuine emphasis on the entertainment value of "flippers," "bumpers," "traps," "gates," "kickers" and other scoring and play novelties (Appendix C, Exhibits C-7, C-8).

It would outrage the classic affinity of pot and kettle to claim that the coin-machine industry, nearly all of which centers in the environs of Chicago, has been forever neatly split between gaming and non-gaming factions. As has been noted, amusement-type pin-ball games made their appearance in the thirties with pay-out mechanisms to reward high scores in cash, tokens or redeemable tickets. And nearly everyone made one-ball machines and one-ball components in the middle 'forties (after nearly everyone had acquitted himself creditably in war production).

But in 1949 a split *did* occur, and since then one segment of the industry has been policing itself and striving to dissociate itself and its products from the other. The federal policy of taxing gaming devices in a specially-identified category is so important in maintaining the distinction, and so effective in compelling local authorities to recognize it, that the very survival of one group or the other may be at stake in the decision of this case.

Amusement pin-ball games cannot compete with any variety of the gambling-adapted slots; hence they have never been tied up with crime syndicates, municipal corruption, or racketeering. When a community goes "wide open," or succumbs to the mobsters and "fixers," its coin-operated amusement games are among the first casualties. The gaming machines cost over \$600, while amusement types sell for less than \$300; but the average weekly earnings of a well-located pin-ball amusement game might be \$15 where its gambling-adapted counterpart would bring

in as much as \$300 to \$400 at the same location in the same period.*

In sum, the amusement-type pin-ball machine is plainly distinguishable from the gaming devices that seek to imitate its appearance and operation. Congress had *both* categories in view when it chose to separate them and impose the tax at different rates. In the first enacted version of Section 4462(a)(1), defining the amusement category, the phrase "so-called 'pin-ball' . . . machines" was actually inserted (Act of Sept. 20, 1941, 55 Stat. 722); but this was dropped by amendment the following year (Act of Oct. 21, 1942, 56 Stat. 978)—strongly suggesting, though the legislative history is sparse, that the lawmakers were then acknowledging precisely what the Government now urges, namely, that "so-called 'pin-ball' machines" might fall in either category, while "so-called 'slot' machines" properly served to describe gaming devices only.

Point III

The Court below erred in identifying so-called one-armed bandits—the most venerable drum-and-reel forbears of modern gaming machines—with the statutory phrase "so-called 'slot' machines."

The Circuit Court concluded that the bingo machines at issue on this case necessarily fell into the amusement category because they were not "so-called 'slot' machines" within the meaning of Section 4462(a)(2).** In reaching this result the Court observed that the gaming-device character of the machines "may well be conceded," and that "if the

* See, Anoh., "Slot Machines and Pinball Games," 289 Annals of the American Academy of Political Science 62, 68-9 (May, 1950).

** The Court seems to have disregarded the violence done to the \$10 category (Section 4462(a)(1)) by its conclusion that if the machines had to be excluded from the gaming classification they would automatically fit the alternate definition, "any amusement or music machine . . . etc.," in the dichotomy.

dictionary definition of 'slot machine' were applied, it is clear that these machines would be covered"

The Court's conclusion, thus avowedly at variance with the sense of the statute and the literal meaning of the statutory language, is based upon extrinsic evidence of the meaning of the phrase in dispute, consisting primarily of a suggestion by the defendant

" . . . that the term 'slot machine' as used in Section 4462 refers specifically to a machine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit (colloquially called a 'one-armed bandit')."

This suggestion is flatly erroneous. From the day of Charles Fey's "Liberty Bell" (Appendix A, Exhibit A-1) to the present, machines of the one-armed bandit variety have been known as "bells," or "bell-fruit machines." (Appendix A, Exhibits A-2, A-3, A-4.) Even when the industry sought to camouflage the original models (Appendix B, Exhibits B-1, B-5, B-9, B-10) it still used the designation "bell"—except where one manufacturer offered to carry the camouflage a step further by providing "either Bell Fruit symbols or the interesting new tobacco symbols." (Appendix B, Exhibit B-9).

Industry usage is in accord with the common-sense interpretation of the language of Section 4462(a)(2) urged by the Government: the "slots" are, generically, the coin-operated gaming machines, including the original one-armed bandit and all its later progeny. The "bells" are a variety of "slots," and it is not incorrect to refer to "bell slots." But the Circuit Court was misled in concluding that *only* bells are slots as, in more familiar fields, it might have erred in holding *only* kodaks to be cameras or *only* sedans to be automobiles.

Moreover, the Court relies on another misconception in

* *United States v. Korpan*, 237 Fed. 2d 676, 679, 681 (C.A. 7, 1956).

** *Ibid.*, 680.

reasoning that Congress must have intended a restrictive meaning for the term "slot machine" because, "Otherwise, there appears no purpose for the use of the language 'so-called 'slot' machines,'" when read in conjunction with the statutory language "... which operates by means of the insertion of a coin, token or similar object"** Even though the lawmakers' intent in connection with this double definition remains obscure in the legislative history, the drafter's problem that gave rise to it is obvious. It was not enough to leave the splendid generic definition of gaming, in the latter part of Section 4462(a)(2),** standing alone, for then *any* mechanism "which, by application of the element of chance, may deliver ... etc.," would have been included, *whether it was coin-operated or not*. This would have laid the tax on parimutuel totalizers, roulette wheels, wheels of fortune, chuck-a-luck cages, and similar devices.

To avoid this, the draftsman added the best-known synonym for *coin-operated* gaming devices: "so-called 'slot machines.'" But he was still left facing a loophole, for slot machines were by tradition *literally* coin-operated: What about the machine that might be activated by a token, key, slug, or some other object not within the definition of a coin? This latter problem he disposed of simply by specifying in the enacted phrasing "which operate by means of insertion of a coin, token, or similar object." Thus understood, the two definitions compliment each other, without in any way suggesting limitation of the scope or meaning of either by the other.

The Court states that it sees force in defendant's conclusion as to the narrow meaning of the phrase "slot machine"—"... when the language thus employed is used in the light of the legislative history of Section 4462." Then, after reviewing the pertinent Congressional references, the opinion continues, "Although the legislative his-

* *United States v. Korpan*, 237 F. 2d 676, 679 (C.A. 7, 1956).

** I.e., the language quoted *supra*, at page 8.

tory of Section 4462 does not clearly demonstrate the meaning and purpose which Congress intended to attribute to the language, 'so-called "slot" machine,' it does indicate that Congress intended to exclude pinball machines . . . etc.'**

It is thus respectfully submitted that the learned Court below mistook the universally-understood meaning of the phrase "so-called 'slot' machine" in equating it with so-called one-armed bandits; that its opinion errs in limiting the phrase by intrinsic interpretation; and that the opinion itself concedes the inconclusiveness of the available legislative history.

Point IV

The mere awarding of free plays, by automatic operation of a bona fide amusement machine, and without any permanent recording feature, does not convert the machine into one properly characterized as a gaming device.

In framing the question presented by this case the Government has introduced an element, not strictly related to the main issue, which is of vital concern to this *amicus curiae*. The Court is asked to consider, and possibly to decide, whether machines the operation of which involve an element of chance are gaming devices within the meaning of Section 4462(a)(2) if "the player may become entitled *either to free plays or to money.*" (Quotation is from petitioner's Petition for a Writ of Certiorari, p. 2.)

There has been much dispute, and some conflict in the authorities, over the question whether the award of free plays, per se, constitutes a valuable "prize"—or whether it is merely a feature of the amusement offered the patron for his initial consideration. See, Anno.: 148 A.L.R. 879.

While this line of cases is not up for review in the instant proceeding, the weight of authority and the better reasoning seems to be aligned with the latter proposition. See, *Washington Coin Machine Ass'n v. Callahan*, 142 F. 2d

* *United States v. Korpan*, 237 F. 2d 676, 681 (C.A. 7, 1956).

97 (C.A.D.C., 1944): Cf., *Holliday v. South Carolina*, 78 F. Supp. 918 (D.C.S.C., 1948), aff'd, 335 U.S. 803.

At very least, the intrinsic worth of a few *gratis* plays on a five-cent or ten-cent amusement device approach the level of "*de minimus . . .*" as a prize-inducement likely to injure society by exploiting man's innate urge to gamble. But, in any event, the free-game problem really turns around something else. As has been set forth in the preceding argument, gaming-type slot machines were modified to incorporate pin-ball features as a camouflage (Point I, "H," page ____; Appendix B, Exhibits B-3, B-____), and when the free-game mechanism was developed, the gaming-machine industry quickly adapted it as a subterfuge to control pay-offs (Point I, "J" page 11; Appendix B, Exhibit B-12). Hence it was the gaming adaptation, by means of the "knock-off button" and "replay meter," and not the mere awarding of free games, that permitted free-play pin-ball machines to be used to evade and defy local anti-gambling laws. See, *People v. Gravenhorst*, 32 N.Y.S. 2d 760, 770 (1942); *In re Sutton*, 148 Pa. Super. 101, 24 A. 2d 756, 760 (1942), Cf., *In re Wigton*, 15 Pa. Super. 337, 30 A. 2d 352, 354 (1943).

This distinction is not always easy for the indifferent observer to grasp. But it is a distinction based on fact, not merely on speculation or opinion. And it cannot be urged too emphatically: *the free-game award device on an amusement machine does not facilitate gambling*. When the machine rewards high scores by free replays which must actually be played off, the result may even be the opposite, for any additional award to the patron would tend to be cumulative and superfluous as a play-inducement. But more importantly, *so long as the replays are unrecorded, the machine cannot control pay-offs based on them, and no accounting is possible between the operator and the location owner if such a practice were actually followed*.

Of course it is quite possible for the location-owner to pay those who play the machines a valuable consideration, *qua* prize, for free games won—just as it is possible for him to

APPENDIX A

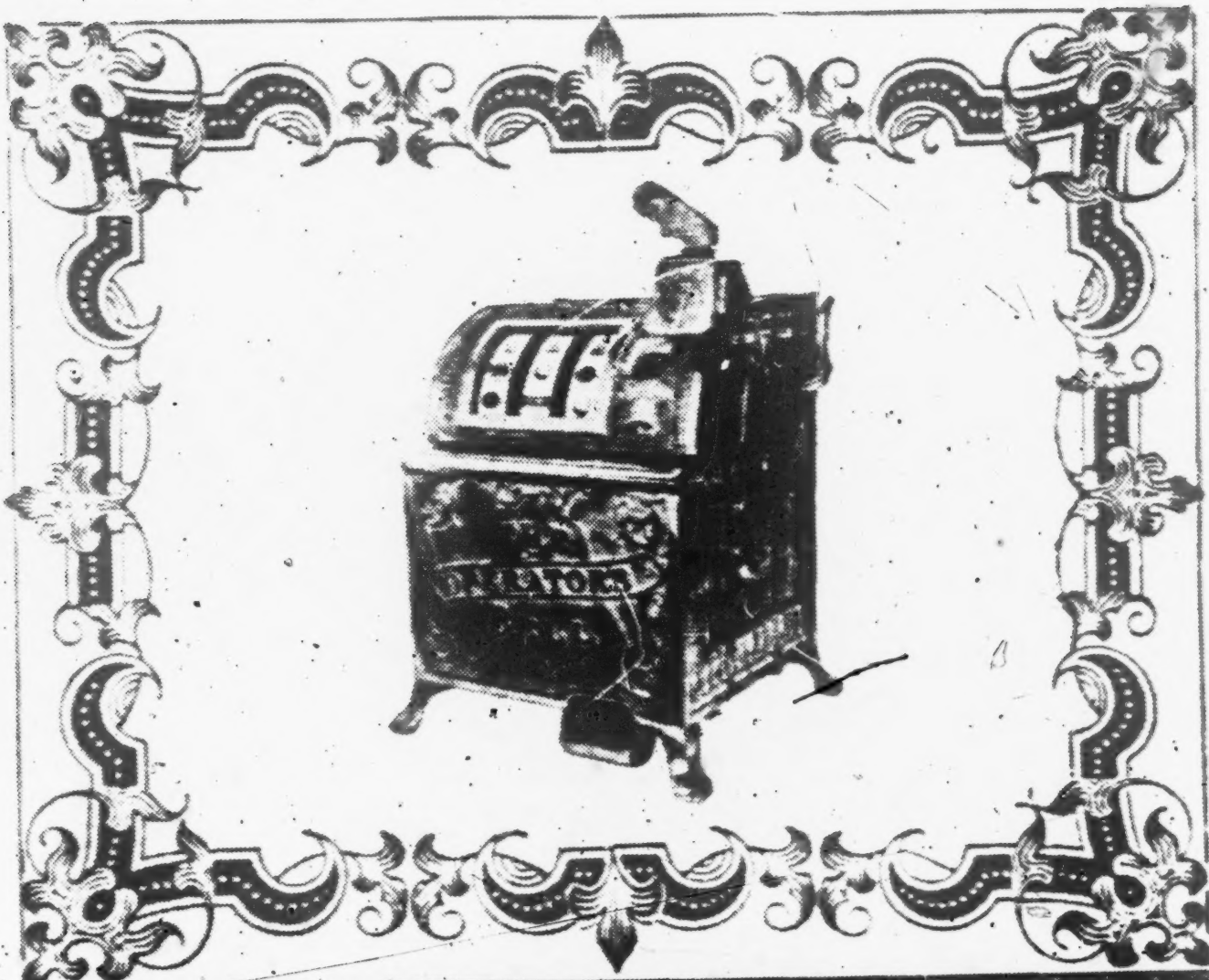


THE SAN FRANCISCO DAILY NEWS in 1935 published a series of cartoon sketches depicting "It Started in San Francisco." The above sketch shows the first slot machine made by Charles Fey in 1889. (Sketch courtesy of Walter Tratsch, A. B. T. Manufacturing Company, Chicago.)

APPENDIX A

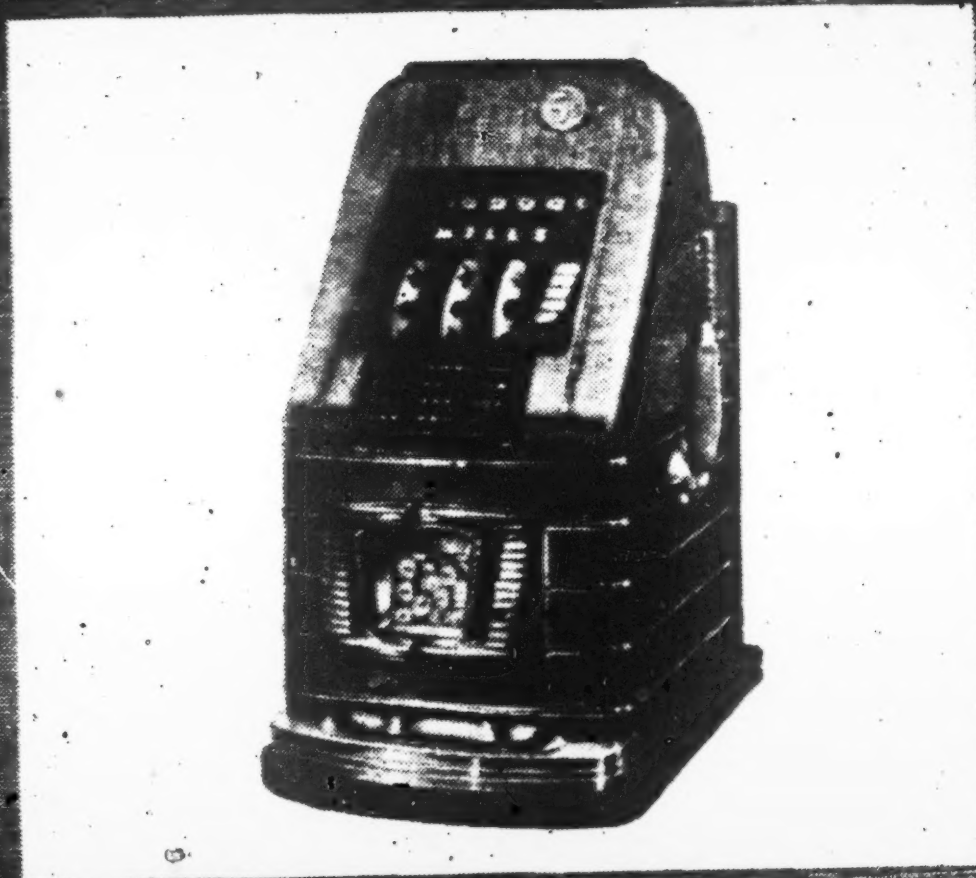
*the
Iron Case
Bell*

1907



1947

*the
Jewel
Bell*



We have come a long way!

Forty years ago, in 1907, Mills Iron Case Bell was all the rage. This sturdy little moneymaker gave excellent performance and brought big revenue to its operators—it was the best Bell of its time. Today Mills again takes the lead, this time with the most beautiful, most modern Bell ever built—THE JEWEL BELL!

BELL-O-MATIC CORPORATION

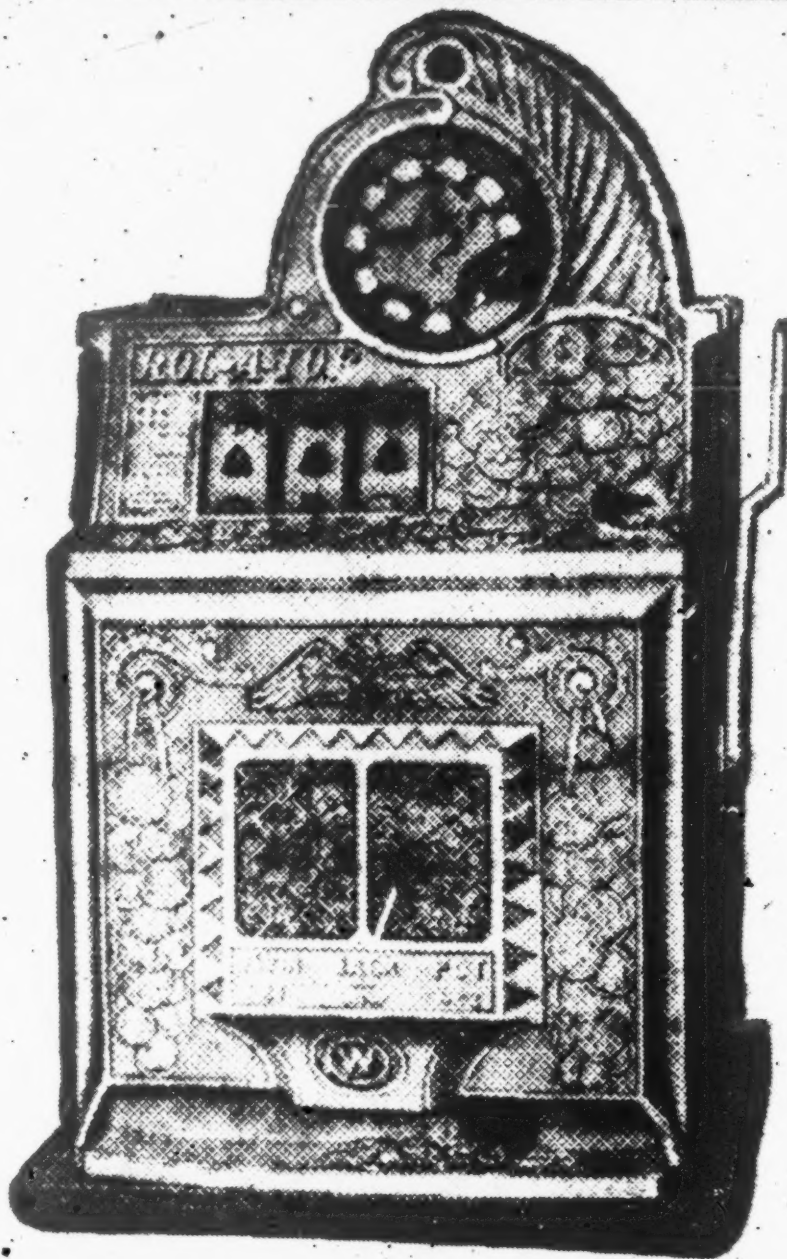
EXCLUSIVE NATIONAL DISTRIBUTOR, MILLS BELL PRODUCTS, 400 FULLERTON AVENUE, CHICAGO, ILL. & SAN FRANCISCO, CALIF.

Exhibit A-2

APPENDIX A

The Billboard

65

**ROL-A-TOP BELL**

The above machine is the first and only Bell type machine on the market with a coin top showing the last 8 coins, the best protection against slugs.

Built in 3 Models,

**Bell, Front Vender and Gold Award
Built for 1c-5c-10c-25c Play**

Made Only By

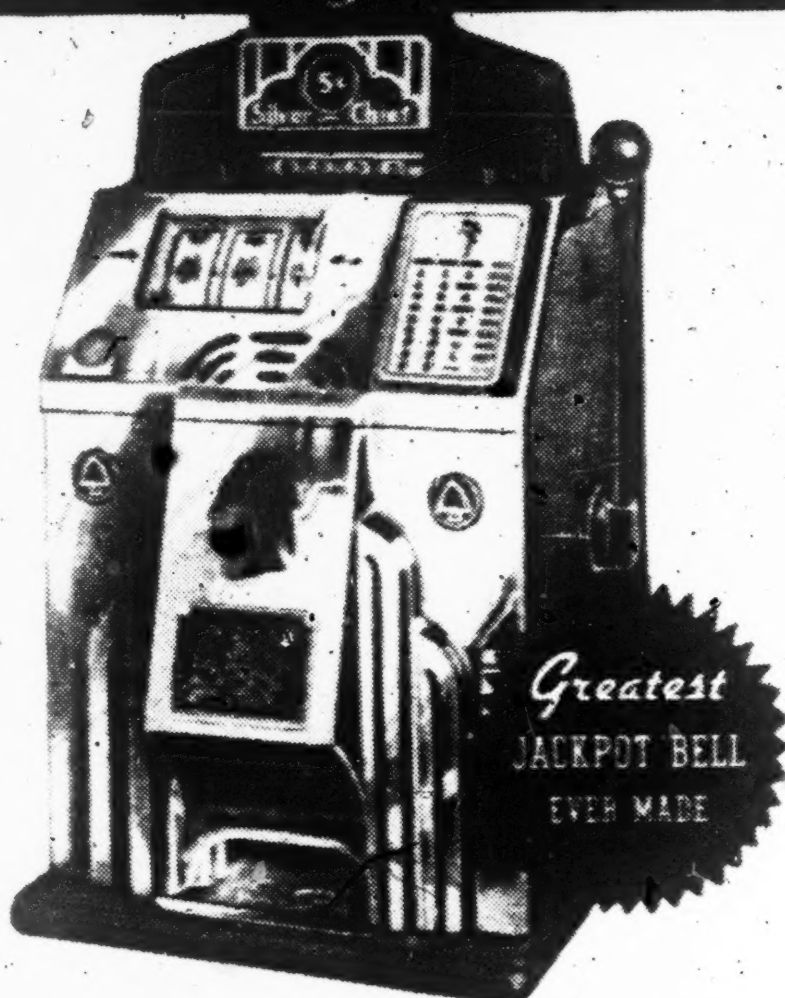
WATLING MFG. CO.

**4640-4660 W. FULTON ST.
CHICAGO, ILL.**

Est. 1889—Tel.: COLUMBUS 2770.
Cable address "WATLINGITE" Chicago

APPENDIX A

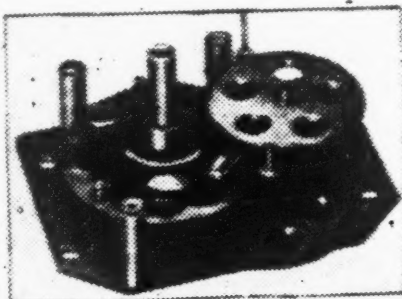
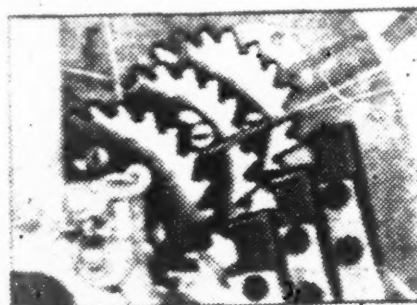
The New Jennings
SILVER CHUTE



CHROMIUM PLATED FRONT
 NEVER GETS DULL — EASY TO CLEAN

**REELS CAN'T
 BOUNCE**

NEW INTERLOCKING STOP LEVERS
 AND STAR WHEELS DO THE TRICK



**NEW HEAVY DUTY
 CLOCK**

WITH SYNCHRO-MESH GEAR DESIGN
 ELIMINATING WASHED TEETH — OVER-
 SIZE PAWLS ON CLOCK GEARS

SMOOTH OPERATING PERFECTION

UNINTERRUPTED PERFORMANCE ASSURES A FULL CASH BOX
 AND MINIMUM SERVICE CALLS

SEE FOR YOURSELF — 10 DAYS TRIAL OFFER

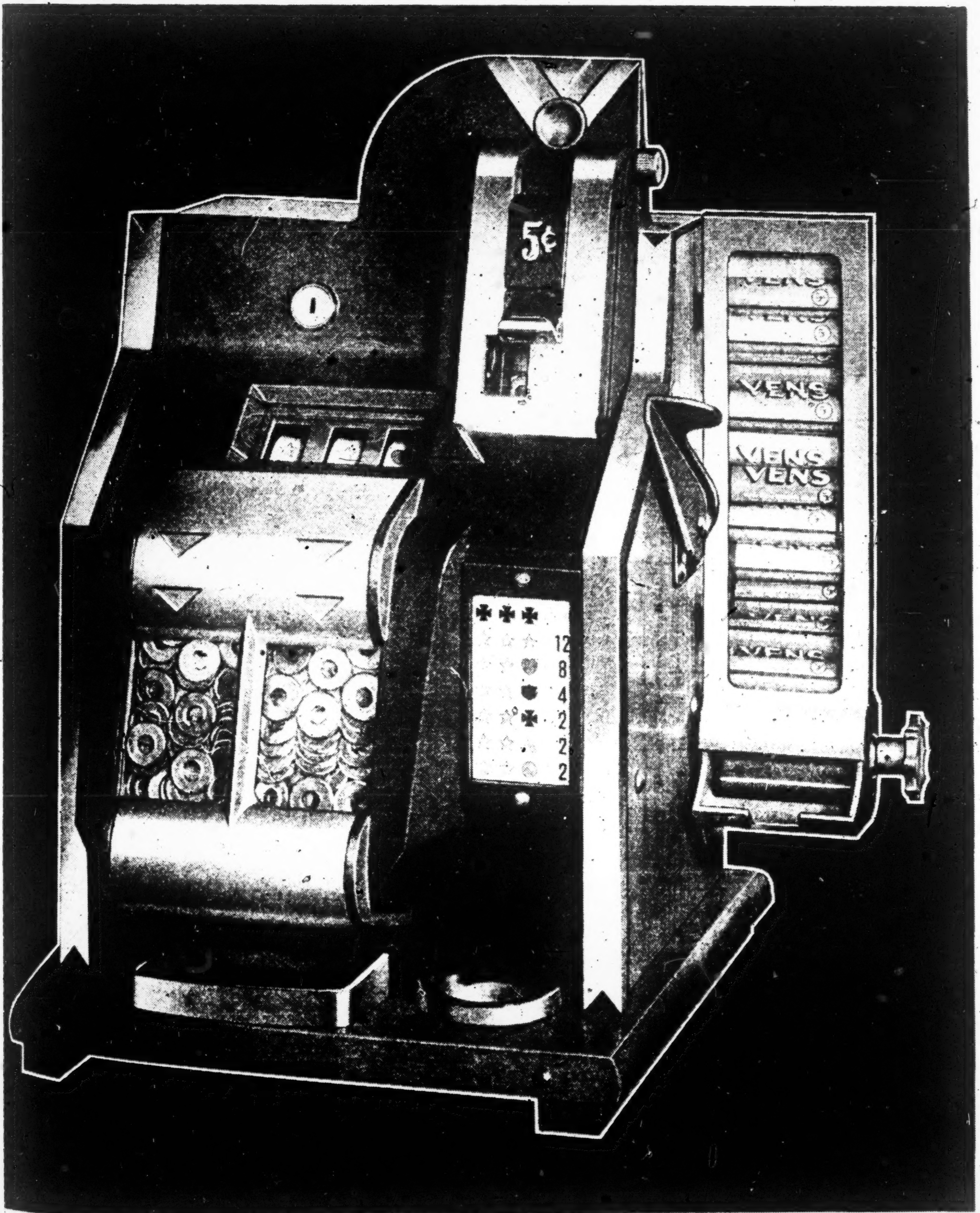
WRITE OR WIRE FOR IMMEDIATE SHIPMENT

OVER 32 YEARS
 MANUFACTURING COIN
 OPERATED DEVICES

RATED AAA
 SUBSTANTIAL AND
 DEPENDABLE

O. D. JENNINGS & COMPANY

APPENDIX B



QT Automatic Bell and Vender • Best Seller of All Best Sellers • Doesn't Know the Meaning of the Phrase "Service Call!"

BELLS

1c . . . \$47.50 Plus Tax

5c . . . \$52.50 Plus Tax

10c . . . \$54.50 Plus Tax

VENDERS

1c . . . \$49.50

5c . . . \$57.50

10c . . . \$59.50

SOLD ONLY TO OPERATORS • YOUR JOBBER HAS Q. T.

Exhibit B-1

give cash awards for high scores, low scores, extra balls, white lights, red lights, red-haired players holding even-numbered Social Security cards, and so forth* To this extent the free-game machine is a putative gambling device exactly like its non-free-game counterpart—and also exactly like the efficient, gravity-powered, durable and widely circulated device, manufactured by Uncle Sam, which is characterized by symbols colloquially known as “heads and tails.”

The gaming machine—the device capable of bona fide distinction from its innocuous simulators—is *the one which awards free games and then records those which are awarded but not actually played off*. There is nothing in the statutes under consideration in this case, nor anything in the pertinent legislative history, that suggests rejecting this distinction. The Treasury Department impliedly recognizes it (Regulation 59, Section 323.22, 26 C.F.R.) in characterizing as gaming devices *only* those pin-ball machines “with respect to which unused ‘free plays’ are redeemed in cash.” (Emphasis added).

In the Model Anti-Gambling Act, drafted by the American Bar Association Commission on Organized Crime in 1952 and approved and promulgated by the National Conference of Commissioners on Uniform State Laws,** the phrase “gambling device” is controlled by a definition similar to the generic definition contained in Section 4462(a)(2),*** and reading as follows:

“ . . . any device or mechanism by the operation of which a right to money, credits, deposits or other things of value may be created, in return for a consideration, as a result of the operation of an element of chance . . . ”

The drafters of the Model Act then acknowledge precisely the distinction being urged here by providing, as an optional

* Cf., *Lytle v State*, 50 Tex. Cr. App. 614, 100 S.W. 1160 (1907).

** Commission on Organized Crime, “Organized Crime and Law Enforcement,” N.Y., The Grosby Press (1952), pp. 57-91.

*** Quoted supra, at page 8.

addition to sanction the non-gaming and innocuous free-play machines:

*"[But in the application of this definition an immediate and unrecorded right of replay mechanically conferred on players of pinball machines and similar amusement devices shall be presumed to be without value.]"**

In sum, then, it is respectfully urged that petitioner's reference to the award of free plays as a test, *per se*, of the gaming character of these machines should be disregarded in disposing of this case; if the reference is not disregarded, it should be corrected and clarified by adding some explanatory reference to the recording feature which is, in fact, the vitiating element.

CONCLUSION

This amicus curiae respectfully supports the position of the petitioner, the United States, believing that the machines in issue are plainly "so-called 'slot' machines" subject to tax at the \$250 rate, that they are not amusement machines and cannot be identified with the latter to qualify for the \$10 rate, and that it was grossly erroneous to limit the statutory definition of gaming devices to the type of machine commonly known as the "bell" or "one-armed bandit" type. Therefore the opinion of the Circuit Court should be reversed, and the ruling of the District Court should be sustained. If this Honorable Court comments on petitioner's allusion to free plays, it should also explain the importance of the recording device which adapts free plays to gaming operations.

Respectfully submitted,

RUFUS KING

DOWNEY RICE

Southern Building

RICE AND KING

Washington 5, D. C.

Washington, D. C.

Attorney for Movant

Of Counsel for Movant

* Commission on Organized Crime, "Organized Crime and Law Enforcement," N.Y., The Grosby Press (1952), p. 65.

APPENDIX B

★ *New!*

★ *Efficient!*

★ *Perfect!*

MILLS GOLF BALL VENDER →

★ Built exclusively for Golf Clubs, it's the most efficient machine of its kind to do everything a golf ball vender should do.

★ It's a full fledged Vender but it pays for itself in mints or checks but strictly in Golf Balls.

★ Every coin played in is registered. Every ball paid out is registered.

★ Capacity 130 to 150 Golf Balls. It gives you extensive service, protects you against a needless waste of time and effort.

★ It is entirely automatic, works just like a Mills Mystery. It comes in a beautiful cabinet and through a large merchandise display window shows the Golf Balls, all of them nationally advertised.

★ If the machine runs out of Balls, it may be reloaded by the Pro. Each ball he gives out is registered. The Pro sells all his balls at highest prices charging them against the cash box.

★ Be the first to offer this marvel to all the clubs in your district, showing them what a coin machine can put in the treasury and how it can make the Club the most popular place in town!

★ This brand new Mills machine opens up a new form of operation. Go after the juicy golf ball business!

MILLS NOVELTY COMPANY
4100 Fullerton Avenue, Chicago

★

Prompt Delivery—Write for Special Quotations

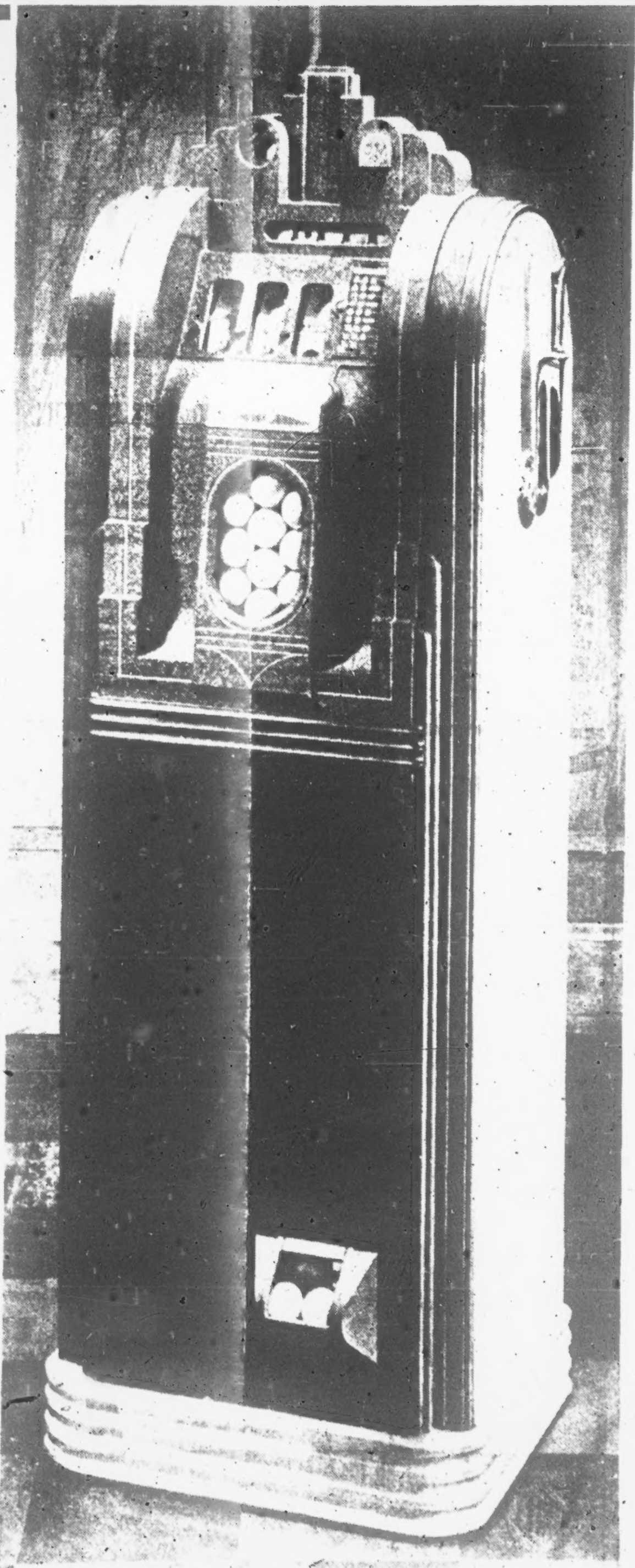


Exhibit B-2

APPENDIX B

Jennings Leads Again with A New Combination Cigarette Vender

Ciga-Rolla

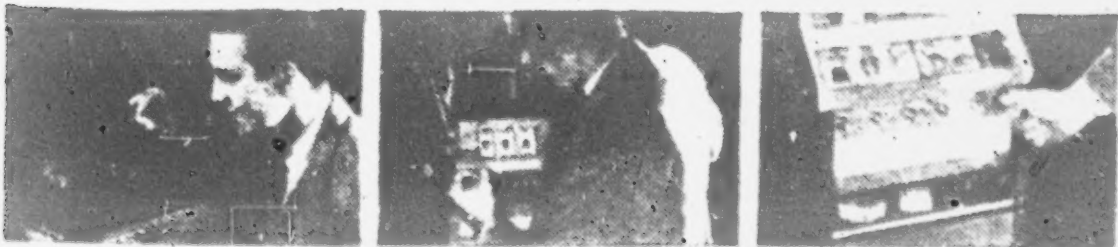
As always, the Leader in new engineering developments which have made it possible for wide awake coin machine men to continue profitable operations, Jennings engineering genius has produced and offers Ciga-Rolla — the machine which, instead of paying cash or check awards, automatically delivers packaged cigarettes, in awards of one to ten packages.

Because it's new — because it's different — because it delivers merchandise awards, not checks or cash — you can operate Ciga-Rolla in many districts where other machines are not permitted. New locations are available — better paying spots, where ordinary machines are criticized by patrons and the public will welcome Ciga-Rolla.

Ciga-Rolla is engineered to make money, not only for the operator, but because it really sells merchandise, locations will demand it for you.

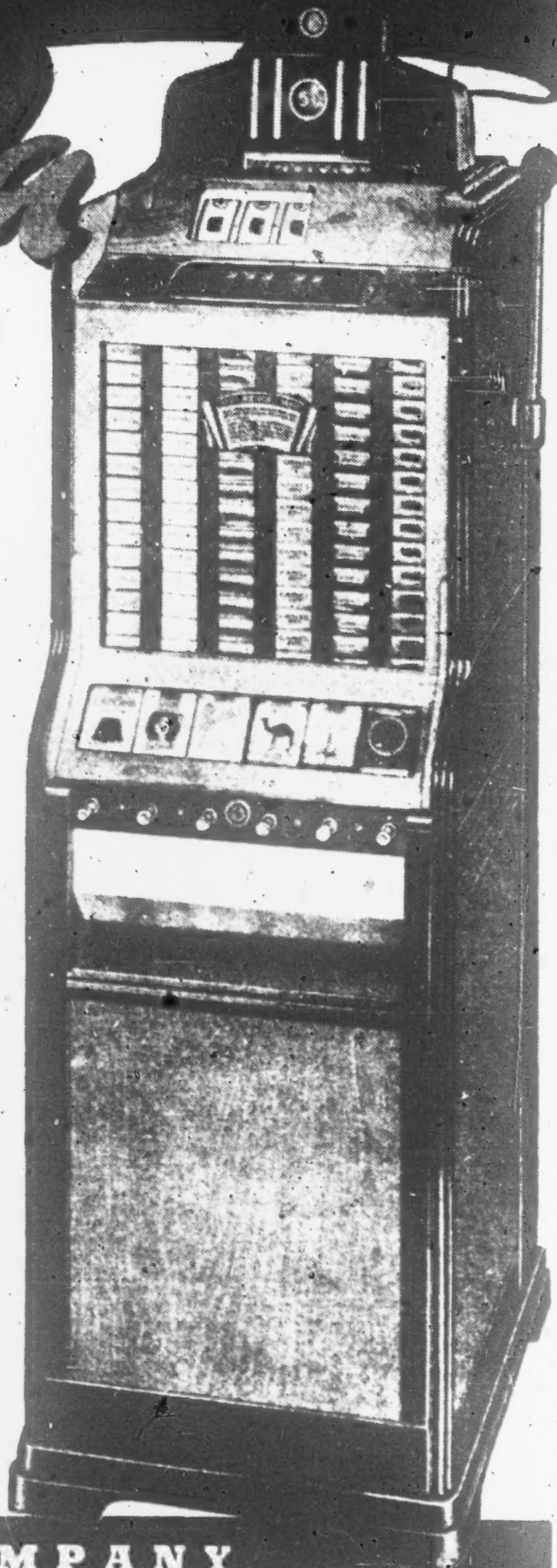
You're right — it plays like a bell — on winning combinations plays selected brand or assortment of brands desired. The famous Ciga-Rolla reel stop development known throughout the industry for its perfect operation guarantees uninterrupted service.

The entire country has been waiting for a new development in the coin machine — the solution to that big problem. "If I could only run this solved with Jennings Ciga-Rolla."



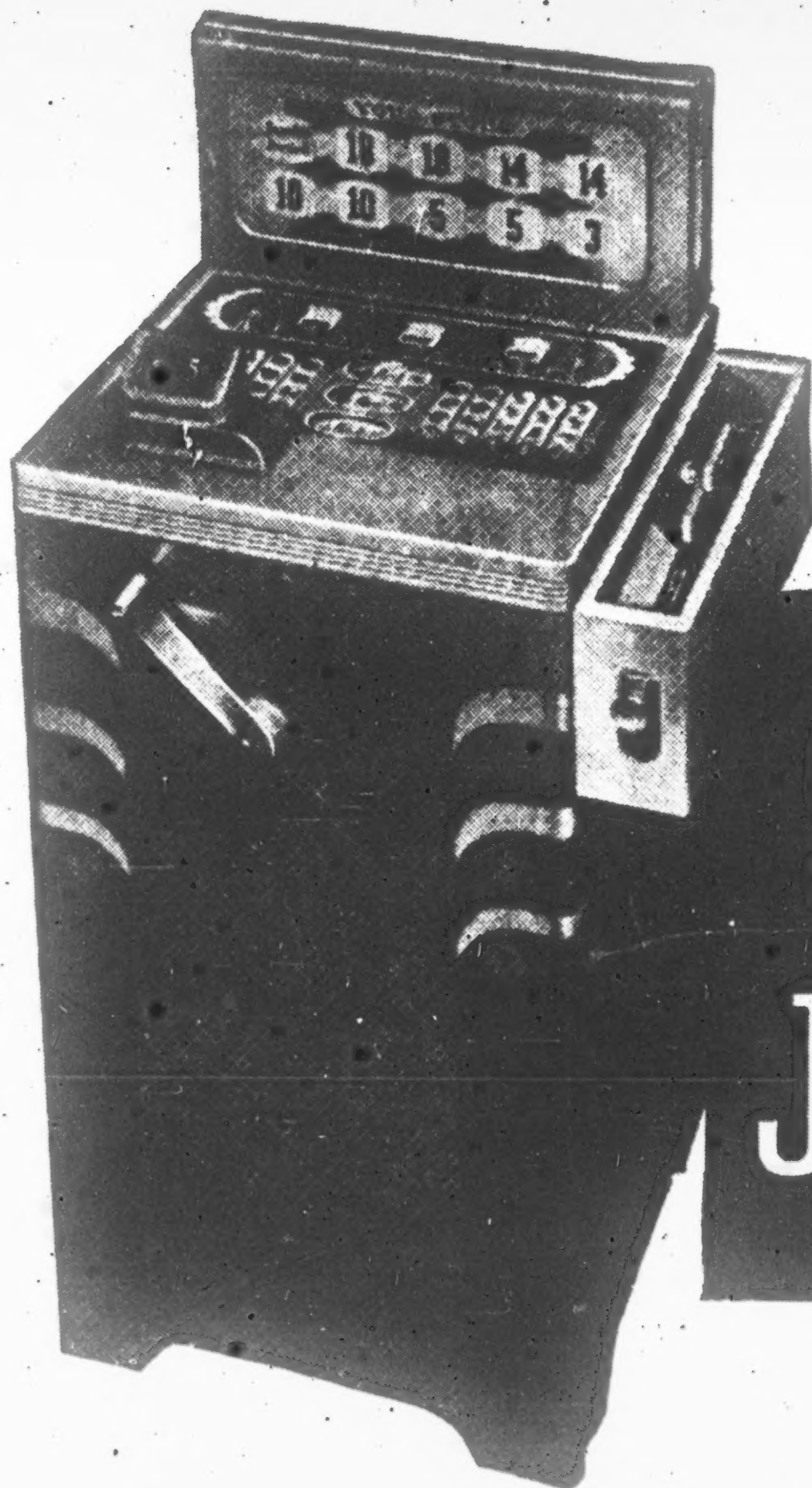
Player drops a nickel... pulls the handle and the reels spin... What a nice surprise!

Please Note: Jennings is a manufacturer of coin-operated machines. Ciga-Rolla is a new development and make arrangements with the Jennings Company for the purchase of this machine. This can be done only with the factory or one of its 116 representatives.



O. D. JENNINGS & COMPANY
4312 West Lake Street Chicago

APPENDIX B



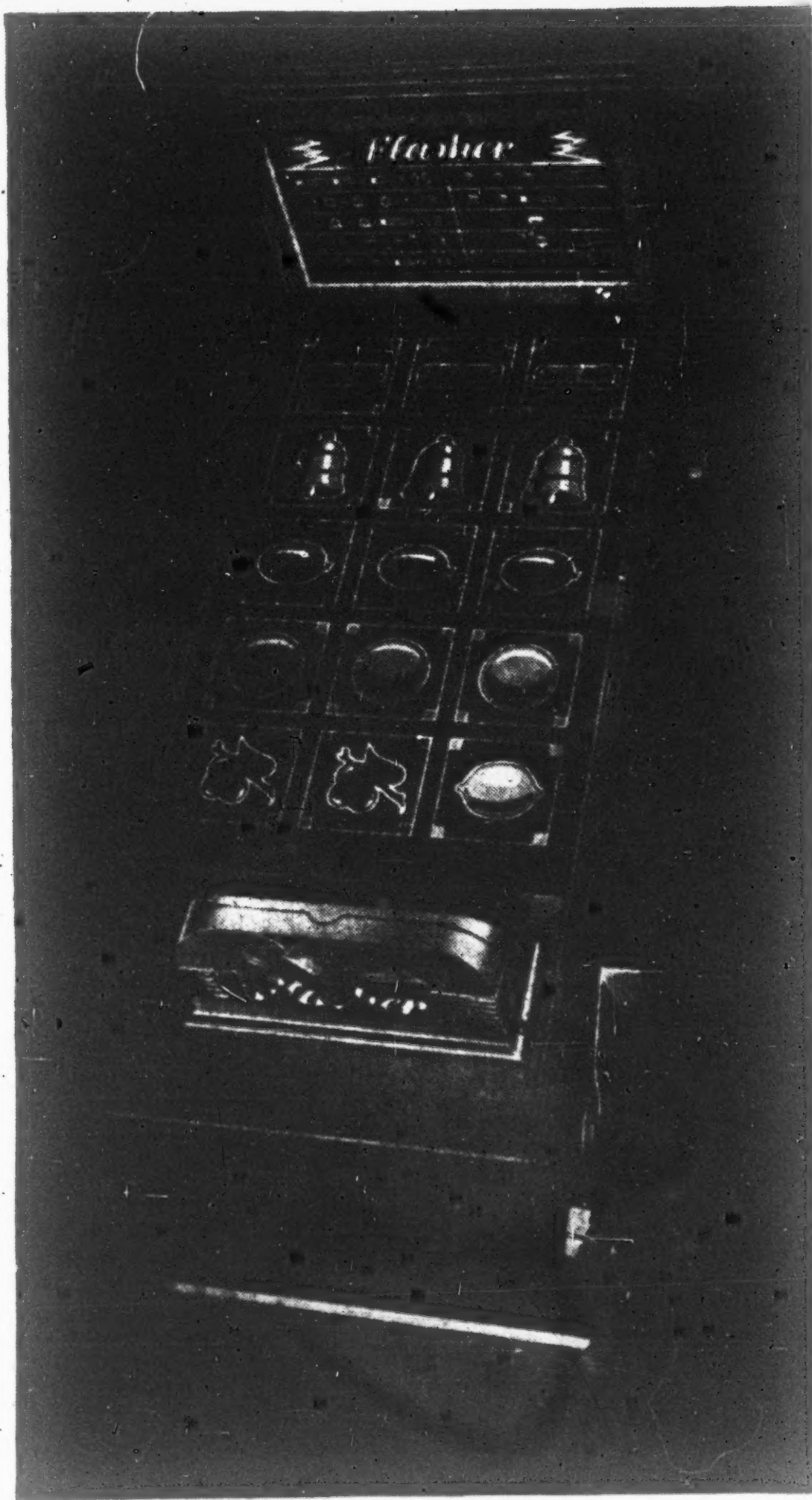
SKILL JUMBO

Jumbo Payout and Jumbo Free Play can now be purchased with special skill field attached which now makes this amazingly popular console into a bona fide pin table of a new shape. Order your skill Jumbos promptly!

MILLS NOVELTY COMPANY, 4100 FULLERTON AVENUE, CHICAGO

APPENDIX B

Flasher!



Flasher is a brand-new creation by Mills Novelty Company. Nothing like it has ever before appeared. It's a table! It's a game! It's a mer! No balls to shoot but more fascinating than any ball game you ever saw. A Bell in every meaning of the word, but a NEW BELL, illuminated, dramatized, simplified! Player deposits nickel and pulls handle. NOTHING ELSE TO DO. Glass is divided into 15 squares, each about 5 inches, showing mammoth bars, bells, plums, oranges, and cherries. ONLY ONE LEMON appears on the entire field. Lights flash from one character

to the other, and finally stop on three characters. The regular Bell award system—including JACKPOT—is used, and rewards delivered automatically. Immediate delivery.

F.O.B. CHICAGO

\$149⁵⁰
PLUS TAX

MILLS NOVELTY COMPANY
4100 FULLERTON AVE., CHICAGO, ILL.

APPENDIX B

AGAIN EVANS SCORES A SCOOP!

Streamline COUNTER and CONSOLE GAMES - A YEAR AHEAD



THE Games of Tomorrow! Originated by EVANS! Brought to you far in advance of imitators, so that you can enjoy their Super-Earnings **WITHOUT COMPETITION!**

These new swanky Streamliners pack Super-Earning power into the smallest space! 16 1/2" wide, 13 1/2" high, 16 1/2" deep. Console models 52" high, 18 1/2" deep, 15" base, 20" base, 15" deep, anywhere!

Both machines reproduce favorite games in fast, intriguing "Bingo" — the KEENO is Automatic. "Bingo" — the game that's tops wherever crowds gather! BONUS is based on the ever popular cross-word craze! Stunning to the modern tempo! Liberal pay-beauty, lively action and liberal play and outs get record-breaking "play and repeats! Odds 2-1 to 20-1. Test locations report performance and profits that put EVANS' precision engineering! Months of testing and perfecting! Mechanically RIGHT — ABSOLUTELY FREE FROM BUGS! Guaranteed to deliver the PERFECT PERFORMANCE for which EVANS is world-famous!

Get the jump on your competitors by putting these Super-Money-Makers into your locations at once! Order immediately on our Money-Back Guarantee!

KEENO

BONUS

MONEY-BACK GUARANTEE

If for any reason you are dissatisfied with any EVANS Game return it within 10 days from date of delivery and we will refund your money!

EITHER GAME Counter Model

\$99.50

SAFE STAND CONSOLE. \$21.00 EXTRA. CHECK-SEPARATOR. \$7.50 EXTRA. TICKET MODEL. \$12.50 EXTRA. MINT VENDOR AND CHECK SEPARATOR. \$17.50 EXTRA.

Plus Tax

Order from your Jobber or Direct

CREATORS OF GAMES OF THE FUTURE

H. C. EVANS & CO., 1522-28 W. ADAMS ST., • CHICAGO

APPENDIX B



Exhibit B-7

HIALEAH

Twin

PIN GAME AND
SPINNER-LITE

CONSOLE

Special

EVANS' NEW 7-COIN HEAD

WITH
PATENTED
REMOTE
PAYOUT
CONTROL

**PERFECT WHERE AMUSEMENT
GAMES ONLY ARE PERMITTED!**

TWO GAMES IN ONE with amazing new
to meet every location requirement!
can be operated for payout, checks, ticket
amusement only—or with Evans' Re-
mote Payout Control for "over the coun-
try" awards. Answers your problem of
making top profits everywhere!

HIALEAH SPECIAL gives racing fans
DOUBLE chances to win! First by pin-
ball play, matching selection indicated.
If no hole is made, then **FREE PLAY** on
Spinner-Lite comes up and player may
win! Odds 2-1 to 40-1!

EVANS' REMOTE PAYOUT CONTROL
Unit (6" wide, 8" long, 3" high) may be
placed anywhere. Registers payouts due
player, so location owner need not leave
to work.

EVANS' NEW 7-COIN HEAD—last 3 coins
visible—is absolutely gyp-proof. Prevents
coin chute grief and increases profits.
Acknowledged by experts and big-time
operators as the best in the business.
Scores of other features plus Evans' famous
engineering guarantee perfect perform-
ance.

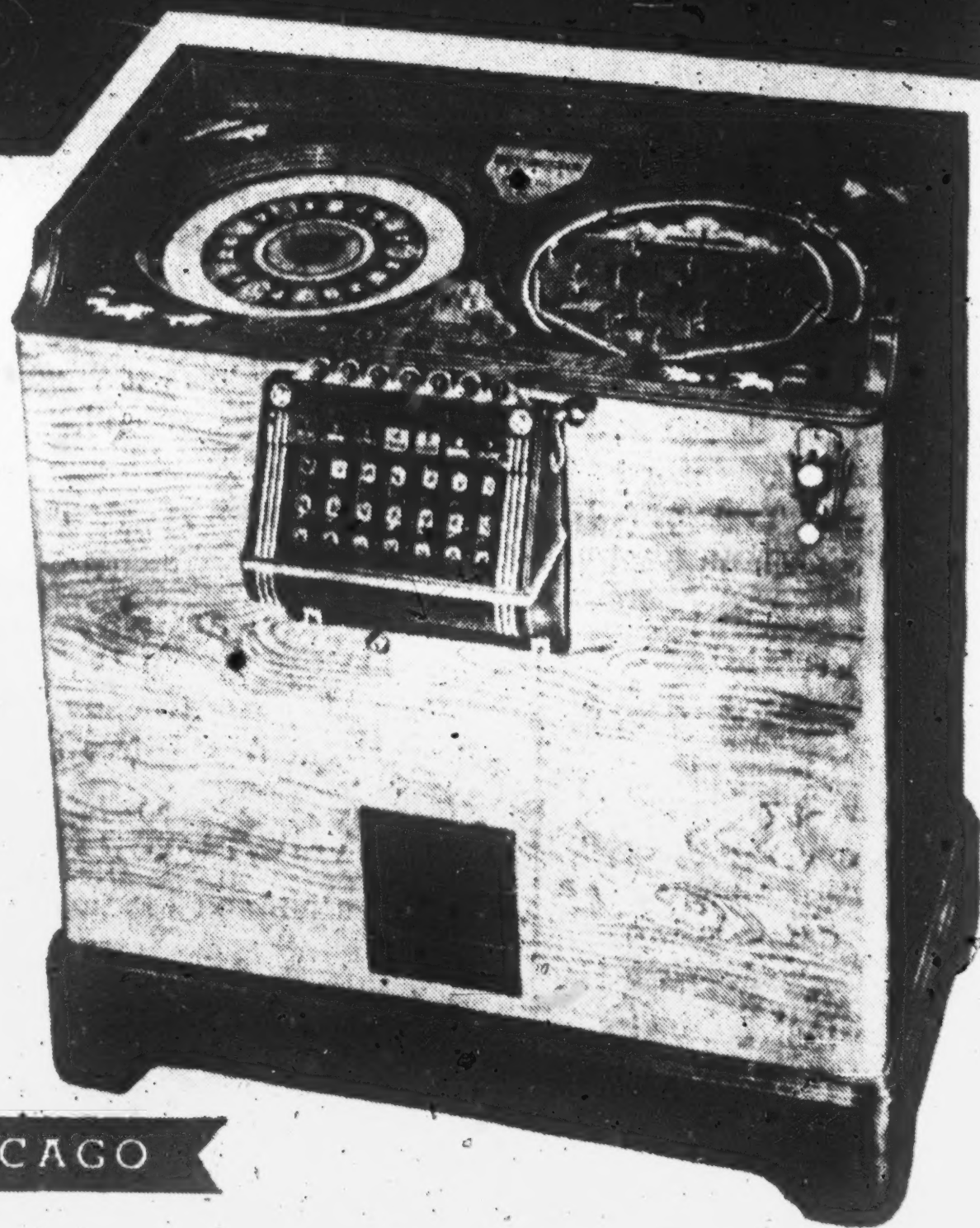
*Write for Evans' Franchise Plan — Biggest
Money-Maker in the Industry! Get the
Dope Quick for Your Territory!*

OTHER EVANS' WINNERS!

PROFIT-SHARING PHONOGRAPH
BY-A-BLADE ROLLETO SR.

WRITE FOR CIRCULARS!

At your Jobber or Write, Wire or
Phone Haymarket 7630.



H. C. EVANS & CO. 1520-1530 W ADAMS ST CHICAGO

APPENDIX B

THE ANSWER TO AN
OPERATOR'S PRAYER!

PAMCO BELLS



CHERRIES • ORANGES • PLUMS
BELLS • BARS

SEE THOSE BELL MACHINE
SYMBOLS ON PLAYFIELD
AND LITE-UP BACKBOARD

AN ALL-TIME
WINNER!

PRICED LOW AT

\$89

GET THAT
BIG
MONEY
NOW!

SIZE
50"
BY
24"

SUPER
DELUXE
BIG
STANDARD
PAMCO
PAYOUT
TABLE
CABINET

Write Wire
for Immediate Deliveries!

U. S. PATENT 2,029,177

PACIFIC AMUSEMENT MFG. CO.
4213 WEST LAKE ST. • CHICAGO, • ILL.
1320 SOUTH HOPE ST. • LOS ANGELES • CAL.

Exhibit B-10

APPENDIX B

Take the games that Took the Show!

PAMCO "HI-DE-HO"



"HI-DE-HO"
The new 'bumpety-bump' 1-shot game that plays both sides against the middle of the lit-up board. Bumping ball animation from top to bottom. The Champion of the Show!

Pamco "RACES"
Smart new 1-ball payout table with famous bowl-type scoring. 'Odds' of 10 to 150 on 'Win'—'Place' and 'Show'. They 'went' for Pamco 'RACES'!

Pamco "RACES"
With 9 coins each play—Pamco "RACES" runs the Bowl and Odds-Commutator up into MORE MONEY-POWER than ever before!

PAMCO "RACES"



SIZE 50" by 24"

IT'S A PACIFIC YEAR

PROFIT WITH PACIFIC

Furnished in bumper-type Novelty Model with two-way scoring—plus the popular idea of matching lights. In the Payout and Ticket Models also!

PAYOUT, \$139.50 • TICKET, \$149.50 • NOVELTY, \$64.50

• PAYOUT . . . \$189.50 • TICKET . . . \$199.50

Pacific Amusement Mfg. Co.

Get Advance Deliveries from Your Nearest Distributor at Once!

4223 W. LAKE STREET, CHICAGO, ILLINOIS
1320 S. HOPE STREET LOS ANGELES, CALIF.

Exhibit B-11

FREE GAME

MODEL of AK-SAR-BEN

LEGAL

Favorable legal opinions and judicial decisions establish the legality of Free Game model of Ak-Sar-Ben! Write at once for complete information on how to build up your territory with Free Game Ak-Sar-Ben!

MAKES OPERATING POSSIBLE and PROFIT-ABLE EVERYWHERE! WESTERN'S SENSATIONAL PAYOUT HIT NOW IN FREE GAME MODEL OPENS UP NEW TERRITORIES—REVIVES OLD LOCATIONS BECAUSE IT'S PROVED LEGAL EVERYWHERE!

MULTIPLE PLAY PAYOUT

6 Way Multiple Play — Mystery Chute—Variable Odds—First, Second, Third Purse Awards!

SINGLE-COIN PLAY PAYOUT

available for locations favoring 1-coin play.

WESTERN EQUIPMENT & SUPPLY COMPANY

925 W. NORTH AVE.,

CHICAGO.



1. Free Game Totalizer! Shows number of Free Games won.
2. Veeder, Counter! Records Free Games "Taken off" by store-keeper.
3. Handy Button Clears Free Games from totalizer.
4. Skill Shot! Makes Western's Free Game Ak-Sar-Ben a 1, 2 or 5 ball game at operator's option.
5. Coin Chute Takes Nickels even tho Free Games won have not been played off.
6. Switch Permits Operation of Coin Chute without insertion of coin if player has Free Games coming.

Exhibit B-12

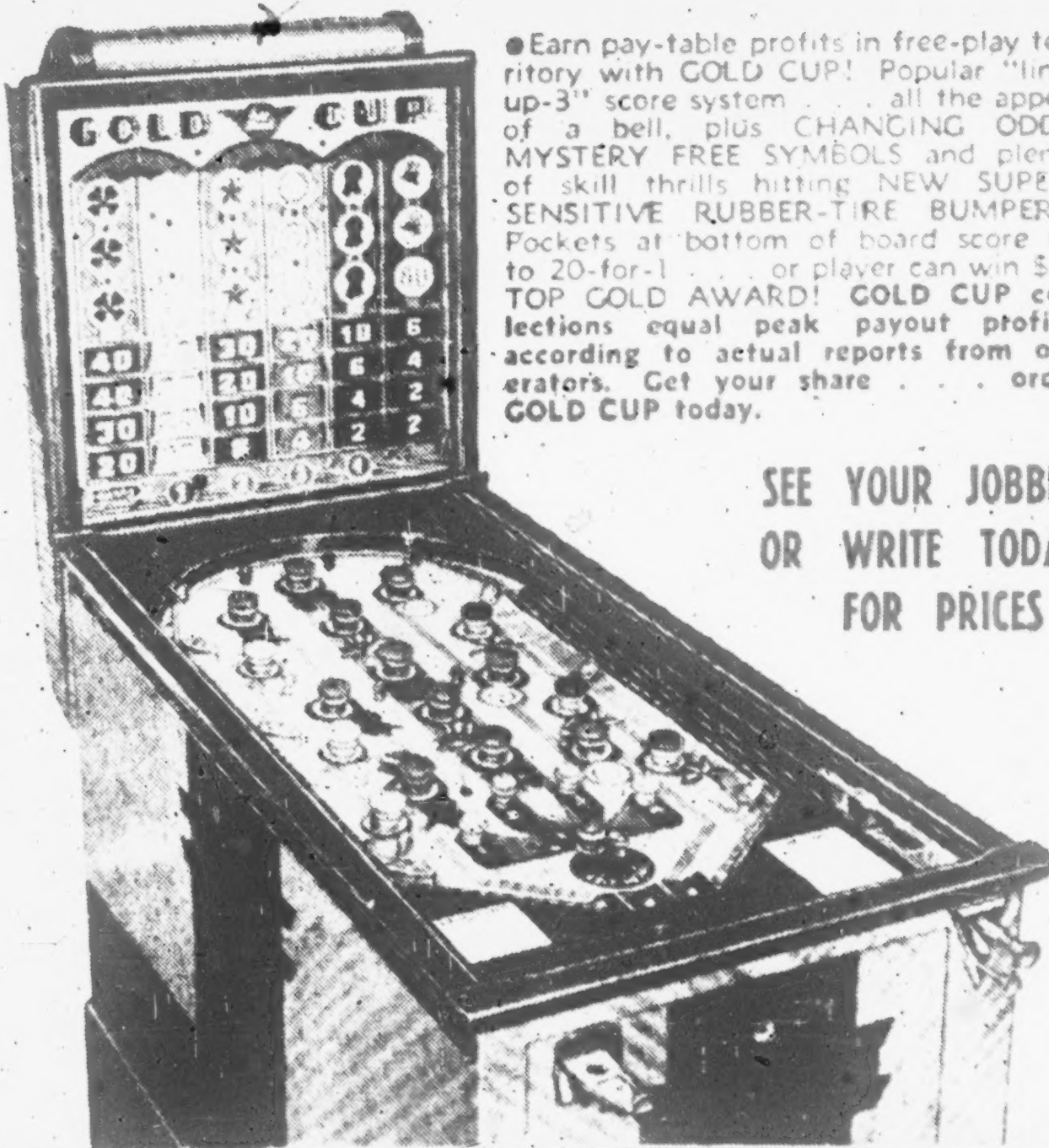
APPENDIX B

APPENDIX B

free play operators!

GOLD CUP

FREE PLAY MULTIPLE ONE-SHOT



● Earn pay-table profits in free-play territory with GOLD CUP! Popular "line-up-3" score system . . . all the appeal of a bell, plus CHANGING ODDS, MYSTERY FREE SYMBOLS and plenty of skill thrills hitting NEW SUPER-SENSITIVE RUBBER-TIRE BUMPER! Pockets at bottom of board score up to 20-for-1 . . . or player can win \$25 TOP GOLD AWARD! GOLD CUP collections equal peak payout profits, according to actual reports from operators. Get your share . . . order GOLD CUP today.

SEE YOUR JOBBER
OR WRITE TODAY
FOR PRICES

PICK-EM "spottem" type novelty or free play game with "Spot-Selector" feature; VOGUE "spottem" type novelty or free play game with "Free Spots" feature and "Futurity" award; CHAMPION high score novelty or free play game; GOLD MEDAL bumper-type multiple one-shot; GRAND NATIONAL pins-and-pockets "Grandstand style" multiple one-shot with reserve feature. See your jobber or write for folders.

BALLY MFG. COMPANY

2640 BELMONT AVENUE,

CHICAGO

APPENDIX B

Bally's PREAKNESS



**1-SHOT • CHANGING ODDS • PAYOUT
AWARDS ON WIN • PLACE • SHOW
AND 4TH PLACE PURSE**

DOMINATING SIZE! SPECTACULAR FLASH!

Player gets from 1 to 7 Selections each game—
can win on Win, Place, Show AND 4TH PLACE
—28 winners possible on a roomy, wide-open
board—and 40-TO-1 TOP ODDS! See the
dazzling flash of the big 14-INCH-HIGH
LIGHT-BOX—the sizzling spring-action
of the play-field—the simple, sturdy
mechanism—positive ADJUSTMENT
feature — and you'll see why
operators call PREAKNESS the
fastest money-maker Bally
ever built! ORDER YOURS
TODAY — BY WIRE!

54 IN. BY 26 IN.

**PAYOUT
\$149⁵⁰**

TICKET: \$159.50

**POWER-PAK
EQUIPPED**

**NO CHARGE FOR
CHECK SEPARATOR**

1/3 with order, balance C.O.D.
L. & L. Chicago.

**VOLUME
DELIVERY
POSITIVELY
MONDAY
OCT. 5**

**RUSH YOUR
ORDER!**

- IN-A-DRAWER MECHANISM
- 12-COIN ESCALATOR
- A. B. T. 400 COIN CHUTE

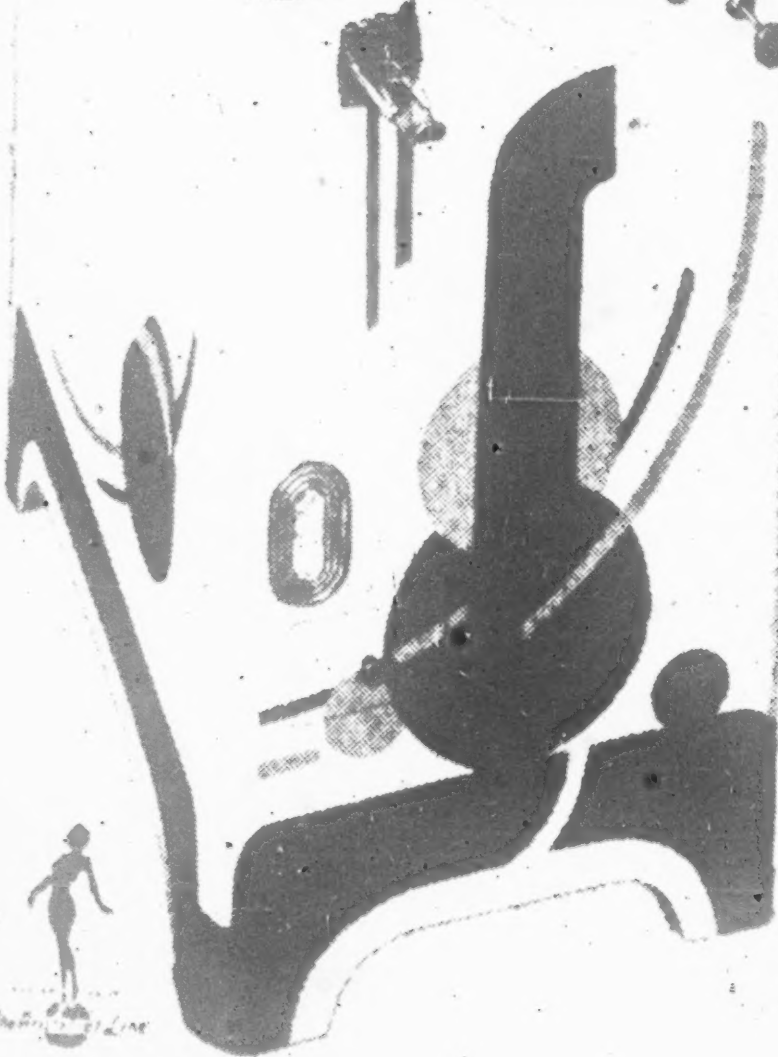
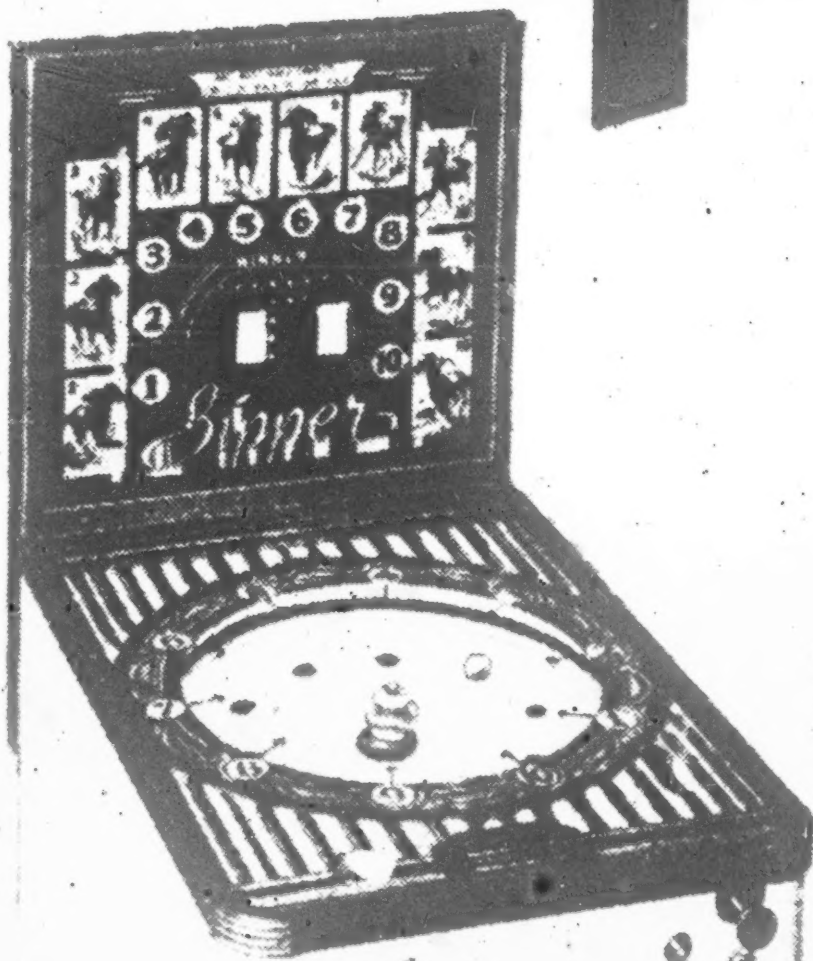


BALLY MFG. CO.

2640 BELMONT AVE., CHICAGO, ILL.

APPENDIX B

★ A COMPACT PAY-TABLE Zipper



ONE BALL CONSOLE

Incorporates a fascinating play idea. Bowl action combined with holes and kicker. Fast and thrilling.

Flashy illuminated back-panel with race horse symbols.

Full payout control.

Motor driven selector and payout unit.

Precision built throughout.

Ticket, cash or check models available.

Zip to town with Zipper.

Stoner Corp.

AURORA • ILLINOIS

WE'LL BE LOOKING FOR YOU
AT THE STEVENS DECEMBER 12th TO THE 15th

APPENDIX B

10 MONTHS

OF CONTINUOUS PRODUCTION...
STILL AMERICA'S FAVORITE PINBALL GAME



Bally TURF KING has been doing a big job for a long time. For 10 solid months, TURF KING has been entertaining the public. And for 10 solid months, operators have been doing a booming business. Made by the makers of the most successful pin games ever produced, TURF KING is the No. 1 hit in the pinball field today. Order from your Bally distributor now.

Bally MANUFACTURING COMPANY

2640 BELMONT AVENUE CHICAGO 18, ILLINOIS

APPENDIX B

UNITED'S **TRIPLE PLAY**

NEW, FLASHY 3-CARD IN-LINE GAME

**WHEN PLAYER LIGHTS
EACH CARD
SCORES**
Panel
**ALL CARDS
SCORE
INDIVIDUALLY**
Highest Score Only

**FIRST COIN
LIGHTS FIRST CARD**
**SECOND COIN
LIGHTS SECOND CARD**
**THIRD COIN
LIGHTS THIRD CARD**
Plus
Advancing Score

ADVANCING SCORES
UMC PENNANT FEATURE
4 CORNERS SCORE 5-IN-LINE EACH CARD
LITE A NAME CARRY-OVER FEATURE
NUMBER SELECTION FEATURE
NEW, QUIET MECHANISM—50 VOLT CIRCUIT
EXTRA BALLS
TIME FEATURE

OTHER UNITED HITS
NOW AT YOUR DISTRIBUTOR

**6 PLAYER
SHUFFLE ALLEY
BOWLING GAMES**

VENUS Shuffle Targetto
Smooth, Quiet
Skee-Skill Game

DERBY ROLL
2-Player Rubber Ball
Roll Down Game with
Race Horse Animation
5th INNING
4-Player Baseball Game

**See
Your
Distributor**

UNITED MANUFACTURING COMPANY
3401 N. CALIFORNIA AVENUE, CHICAGO 12, ILLINOIS

APPENDIX B

Greater than GAYETY! Better than BIG-TIME!

4 MAGIC LINES

MAGIC POCKETS

New **Score Booster** *Lites*
WITH SUPER-CARD PLAY-APPEAL

New 10-SERIES **Advancing Scores**

**CORNER SCORES
SPOT NUMBERS
EXTRA BALLS**

New High-Speed Coin-Flash
New improved spin-mechanism and special fast motors result in faster flash ever seen on a pinball game, speedier coin-play, increased earning power.

New Speedy Ball-Clearance
Balls from 7 top rows (Magic-Pockets) do not roll down play-field at end of game but are immediately cleared through hole at top of board.

SEE BALLY BOWLERS ON PAGE 35

BALLY MANUFACTURING COMPANY 2640 Belmont Avenue Chicago 18, Illinois

Exhibit B.18

APPENDIX B

Bally[®] Hi-Fi

famous **IN-LINE** features
plus new exciting
SKILL-ACTION

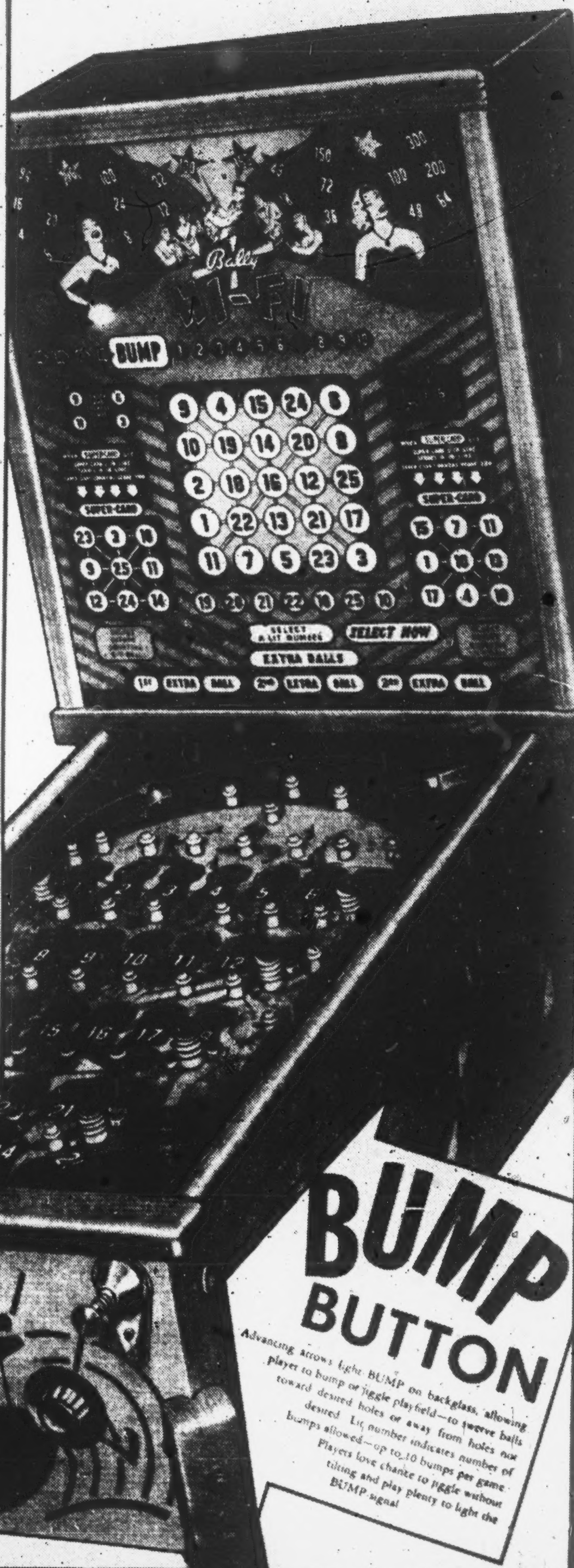
NOW in-line scoring is more thrilling than ever, earns more money than ever—thanks to the new BUMP-feature. Electrically operated, the new Bally BUMP-mechanism eliminates player-fatigue caused by hand-operated devices—and gives more action and skill control. Smooth and quiet in operation, BUMP-feature gets immediate extra play and profit. Get in on the ground floor of the 1954 BUMPer boom. Get HI-FI on location now.

IN-LINE SCORES • CORNER SCORES

ADVANCING SCORES • SELECT-A-SPOT

EXTRA TIME • EXTRA BALLS

SUPER-CARDS • SPOT ROLL-OVERS



Bally Manufacturing Company, 2640 Belmont Ave., Chicago 18, Illinois

SEE NEWEST IN LINE SENSATION
Bally VARIETY
AT YOUR FAVORITE DISTRIBUTOR TODAY

INCREASE PINBALL EARNINGS

WITH AMAZING **Magic-Lines** FEATURE

Card-numbers actually move
UP and **DOWN** like magic!

See **VAR**—Line in action in **Bally VARIETY**! See Card-numbers change before your eyes—see numbered line-ups as hi numbers magically straightened out from "ballyhooing ups"! You'll see why every location-report rates **VARIETY** as the most "ballyhooing" in town!

MORE WAYS TO SCORE!

[illegible]

Famous Features

[illegible]

Player Turns Knobs
to move first 3 lines of card
UP OR DOWN
for best scoring arrangement

Learn more from us to help prove that
TARDIS was a winner in our games, including
how to win big prizes and more. Continuous
renewals are a great-smelling earning power.
Get your share per TARDIS today.

Bally Manufacturing Company, 2640 Belmont Ave., Chicago 18, Illinois

APPENDIX C

BAFFLE BALL

*The Biggest Amusement Value Ever
Offered in Coin Machine History?*

Trial Machine **\$17.50**
only

5 or More... \$17.00

10 or More... 16.00

25 or More... 14.00

Special Steel
Stand 2.50

Write for
Quotation
on Larger
Quantities

Pays for
Itself
**FIRST
WEEK**

Baffle Ball is the proven King Pin
of them all. Operators are report-
ing bigger earnings than ever.
Cash in on Baffle Ball popularity.



L—24"
W—16"

**BUILT FOR
LIFETIME
SERVICE**

7 Plays for 1c

Exhibit C-1

NO PRICE INCREASE

We anticipated rising costs and advanced CASH to our sources of supply to protect our customers.

Exhibit C-2

36" x 18"



Fastest
selling game in
America!

**BIG
BROADCAST
SPECIAL**

Repeat orders for this great machine keep production at top speed. Records of leading operators show it pays to *concentrate* on Big Broadcast! Add to your route now for big summer play.

3 Models
\$21⁵⁰ **\$22⁵⁰** **\$45⁰⁰**
Special Senior
Include Legs and Tax
Third with Order, Certified Check
Balance C. O. D.

D. GOTTLIEB & CO., 4318 W. Chicago Ave., Chicago, Ill.

NEW YORK
1123 Broadway
ATLANTA
123 Hurt Bldg.

PITTSBURGH
Forbes & Stevenson Sts.
MILWAUKEE
1125 N. Water St.

CINCINNATI
1922 Freeman Ave.
MINNEAPOLIS
1643 Hennepin Ave.

LOS ANGELES
1038 W. 7th St.
ST. LOUIS
4505 Manchester

DALLAS
1108 Main
KANSAS
3404 M

WINNIPEG, CAN., 115 Phoenix Bldg.

APPENDIX C

APPENDIX C

A "Come On" they Can't Resist!

RELAY

Breaks All Records for Repeat Play!

ANOTHER GOTTLIEB HIT!

RELAY opens an entirely new angle of player appeal! An original "come-on" innovation that means bigger, longer play and higher profits for location owner and operator. Once a player starts playing RELAY he'll continue, because to stop is to rouse a thought that the next player will get the winning score. In playing RELAY if a ball strikes the Relay Hole, the balls held by the three relay Traps automatically drop into higher score pockets. If at the end of the game, the Relay Hole remains un-tilled, the next coin inserted clears the entire board of balls except those held by the Relay Traps. These balls remain on the board until the Relay Hole is struck. The possible high scores that these balls may yield serve as a powerful incentive for the next game. Operate RELAY and learn that a remarkable money-maker it really is!



Size
38 in. Long
17 in. Wide

A REAL BUY!

RELAY TRAPS • TANTALIZ-
ING SPINDLE SPRINGS •
NEW 38" x 17" CABINET •
FAMOUS A. B. T. CHUTE
• NEW BALL LIFT AND
PLUNGER • COILED RE-
BOUND SPRING • POSITIVE
ANTI-TILT • FLOOR LEVEL
GAUGE—AND MANY OTHER
QUALITY FITTINGS
NEVER BEFORE FOUND IN A
LOW PRICED MACHINE!

Complete with Legs
1 or 100

\$26⁵⁰

Tax Paid F. O. B. Chicago

Electric Bell which rings automa-
tically each time ball strikes Relay
Hole, extra \$1.50

D. GOTTLIEB & CO.

2736-42 N. PAULINA ST., CHICAGO, ILLINOIS

NEW YORK:
20 W. 17th St.

DALLAS:
2118 Jackson St.

LOS ANGELES:
1347 W. Washington Blvd.

MINNEAPOLIS:
1643 Hennepin Ave.

LONDON, ENGLAND: Burrows Automatic Supply Co., Ltd., 78-81 Fetter Lane

CANADA—D. Gottlieb Co., 115 Phoenix Bldg., Winnipeg, Canada

Greatest Value in the Low Priced Field!

Exhibit C-3



The blazing beauty of FIRE CHIEF is one of its many outstanding qualities. Its playing field is of natural wood, artistically colored and designed, and set into an attractive walnut finished decorative cabinet.



A NEW JIGSAW

FIRE!—The cry that brings children to their feet. Craning, looking, running to see the sight. The sound of the piercing shriek of the siren, the flame and the crackle of fire—thrillingly absorbing, thrilling.

And, now, for the first time in history, all the fascinating excitement of a fire is reproduced mechanically in a new game-wonder.

HOW IT IS PLAYED

Insert a coin and let FIRE CHIEF unfold its amazing action. Immediately the light-up rack bursts into flame. The "S.O.S. Alarm" pocket is filled, and rings the fire alarm. The "S.O.S. Light" is illuminated. If the machine is turned off and played.

Now skillfully extinguish the blaze by directing the ten one inch marble balls. Each of the sixteen pockets extinguishes one to four of the ship that is on fire. It is possible to put out the blaze with four balls by filling each of the four "Life Preserver" pockets, each controlling four sections. Two balls placed in both

49.50

Tax Paid F.O.B. Chicago

7-DAY MONEY-BACK GUARANTEE
FIRE CHIEF is guaranteed to be everything we say it is. If in seven days you don't think it one of the finest money-makers you've operated, return the machine and your full purchase price will be refunded. You can't lose!



A NEW SENSATIONAL JIGSAW PUZZLE IN LIGHTS

FIRE!—The cry that brings men, women and children to their feet. Craning, looking, running to see the sight. The sound of fire apparatus, the piercing shriek of the siren, the spectacle of flame and the crackle of fire—all are devastatingly absorbing, thrilling to the nth degree!

And, now, for the first time in coin machine history, all the fascinating excitement of a fire is reproduced mechanically, is offered to the public in a new game-wonder—FIRE CHIEF!

HOW IT IS PLAYED

Insert a coin and let FIRE CHIEF unfold its amazing action. Immediately the ship on the light-up rack bursts into flame. Aim for the "S.O.S. Alarm" pocket, which must be filled, and rings the fire alarm, two red lights flash and the "S.O.S. Light" on the rack is illuminated! If the machine is tilted the S.O.S. light is turned off and play is void.

Now skillfully extinguish the blaze by directing the ten one inch marble balls to certain pockets. Each of the sixteen pockets when filled extinguishes one to four of the sixteen sections of the ship that is on fire. It is possible to put out the blaze with four balls by filling each of the four "Life Preserver" pockets, each controlling four sections. Two balls placed in both

the "fore blast" and "aft blast" holes will extinguish the blaze. A shot into the "Dynamite" hole snuffs out the entire fire. Awards are based on the least number of balls required to extinguish the fire. Awards may also be based on score, with one odd colored ball for double.

A MECHANICAL WONDER

FIRE CHIEF is remarkably simple in construction. Every working detail has been placed through exhaustive tests, and carefully studied. Every possibility for imperfection in operation has been eliminated. FIRE CHIEF will give steady, trouble-free performance for months and months. It is not an experiment—but a sound, proven attraction that will have undisputed dominance in any location. Choice of batteries or transformer at same price.

MONEY-BACK GUARANTEE

You can place full confidence in FIRE CHIEF'S earning capacity and in its ability to "take it." A seven day money-back guarantee backs each machine. You take no risk! The game **MUST BE GOOD**, or else this liberal guarantee could not be offered. So don't lose a moment's time. Come along with the FIRE CHIEF! Place your order now!

49.50

Tax Paid F.O.B. Chicago

7-DAY MONEY-BACK GUARANTEE
FIRE CHIEF is guaranteed to be everything we say it is. If in seven days you don't think it one of the finest money-makers you've operated, return the machine and your full purchase price will be refunded. You can't lose!

many outstanding qualities, colored and designed, and set

APPENDIX C



SURPRISE OF 1

Outstanding Low Price Hit

SLUGGER

5-BALL BASEBALL NOVELTY

The big Gottlieb-quality game at an unbelievable low price! Massive cabinet, 22"x44". Giant backboard, 22" square, flashes animated lights running the bases. Runs recorded on score board. Mystery slot revolves, new ingenious twin spinner discs. Lower disc shows Visiting Team, which represents odds. Top disc shows score which player must beat to win. An assortment of award cards furnished. New simplified mechanism, mushroom-type bumper-springs, new barrel and coil springs. All the play and appeal of highest priced payouts, at believe it or not.

\$69⁵⁰

IMMEDIATE DELIVERY
ON ALL MACHINES

D. GOTTlieb & CO., 2736-42

APPENDIX C

New! **GLOBE TROTTER**

5-BALL NOVELTY

SENSATIONALLY LOW-PRICED

You'll be going places with this honey of a money-maker! Massive in size, has features found only in highest priced payouts, yet sells at a record-breaking low price! Mystery Slot revolves twin spinner discs. Top disc shows miles player must travel to win, lower shows destination, which represents odds. Award Cards furnished. New Odometer mileage totalizer, new-type bumper springs, new simplified mechanism, fully accessible. Colorful playing field, moderne cabinet, Only

\$69⁵⁰!

Cabinet
22"x44"
Backboard
22" square

SLUGGER

5 Ball Baseball
Novelty,
STILL GOING
STRONG!

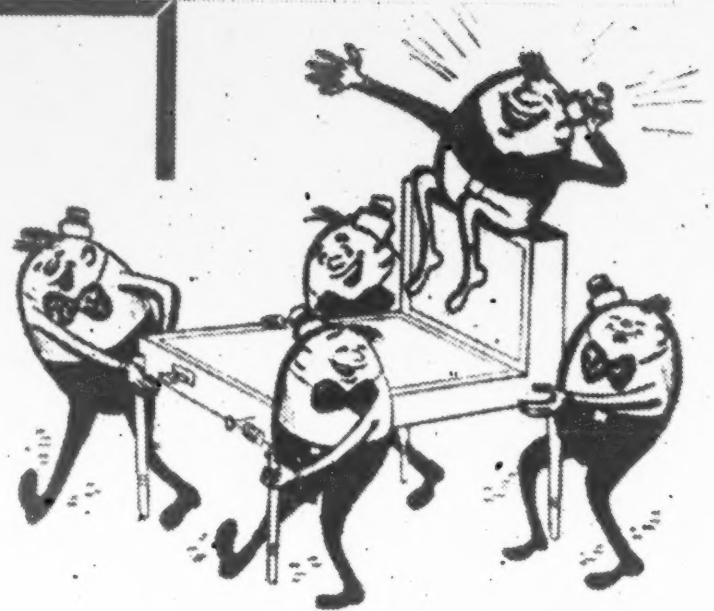
IMMEDIATE
D. GOTTlieb & CO., 2736-42

APPENDIX C

Merrily We Roll
Along, Roll Along WITH

**HUMPTY
DUMPTY**

THE
GREATEST
INNOVATION
IN THE
HISTORY
OF
PIN GAMES!



THE PLAYER WILL **LAUGH!**
 THE SPECTATOR WILL **ROAR!**
 THE OPERATOR WILL BE **THRILLED!**

YES . . . SOMETHING NEW HAS BEEN ADDED . . .
 SENSATIONAL PLAYER-CONTROLLED

FLIPPER BUMPERS

Super-sensitive Flipper Button, on side of Cabinet, controls 6 unique
 FLIPPER BUMPERS on Playing Field. With SKILL and timing,
 player can control balls . . . can send them zooming from the bottom
 right-back to the top . . . whizzing and bounding around the field
 for additional scoring! It's positively terrific!

PLUS
 HIGH SCORE • SEQUENCE
 BONUS • KICKER POCKETS

A GAME OF
 SKILL and
 TIMING!
 PLAYER
 CONTROLS
 FLIPPER
 BUMPERS!

ORDER FROM
 YOUR DISTRIBUTOR
NOW!



"There is no substitute
 for Quality!"

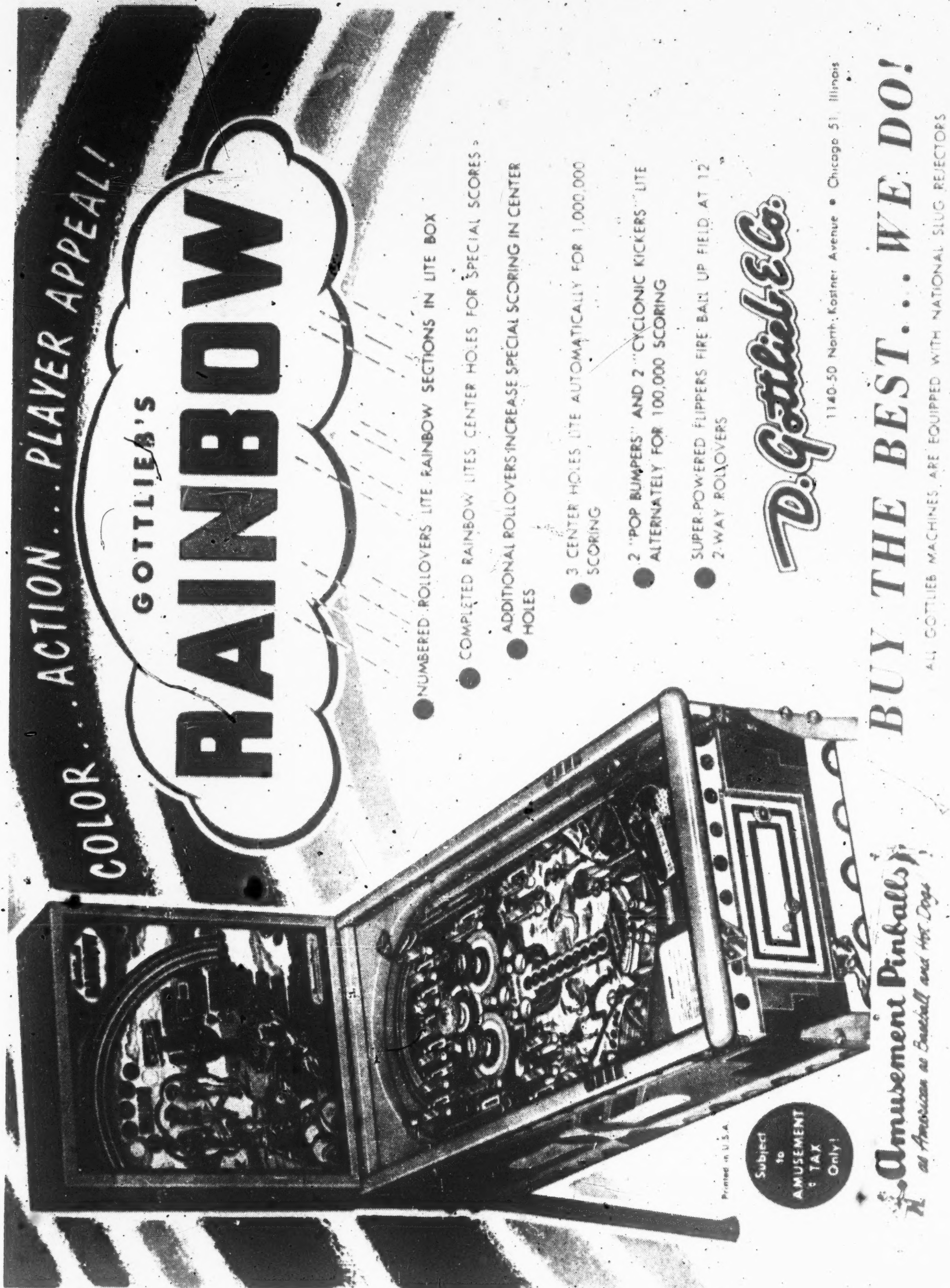


BOOTHS
 2-3-4

WRITE FOR
 NEW
 PARTS
 CATALOG
 FACTORY PARTS FOR
 GOTTLIEB GAMES

D. GOTTLIEB & CO. 1140 N. KOSTNER AVENUE, CHICAGO 51, ILLINOIS

APPENDIX C



COLOR... ACTION... PLAYER APPEAL!

GOTTLIEB'S RAINBOW

- NUMBERED ROLLOVERS LITE RAINBOW SECTIONS IN LITE BOX
- COMPLETED RAINBOW LITES CENTER HOLES FOR SPECIAL SCORES
- ADDITIONAL ROLLOVERS INCREASE SPECIAL SCORING IN CENTER HOLES
- 3 CENTER HOLES LITE AUTOMATICALLY FOR 1,000,000 SCORING
- 2 "POP BUMPERS" AND 2 "CYCLONIC KICKERS" LITE ALTERNATELY FOR 100,000 SCORING
- SUPER-POWERED FLIPPERS FIRE BALL UP FIELD AT 12 2-WAY ROLLOVERS

D. Gottlieb & Co.

1140-50 North Kostner Avenue • Chicago 51, Illinois

BUY THE BEST... WE DO!

ALL GOTTLIEB MACHINES ARE EQUIPPED WITH NATIONAL SLUG REJECTORS

Amusement Pinballs
as American as Baseball and Hot Dogs

Printed in U.S.A.

Subject to AMUSEMENT TAX Only!

Exhibit C-8

Office - Supreme Court, U.S.

FILED

MAR 25 1957

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 596

UNITED STATES OF AMERICA,
Petitioner,

vs.

WALTER KORPAN,
Respondent.

**RESPONDENT'S MEMORANDUM IN OPPOSITION TO
MOTION OF D. GOTTLIEB AND CO. FOR LEAVE TO
FILE BRIEF AS AMICUS CURIAE.**

ROBERT A. SPRECHER,
100 West Monroe Street,
Chicago 3, Illinois,
Attorney for Respondent.

Of Counsel:

SIMON HERR,
111 West Monroe Street,
Chicago 3, Illinois,

FRANK A. KARABA,
100 West Monroe Street,
Chicago 3, Illinois.

IN THE
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OCTOBER TERM, 1956.

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UNITED STATES OF AMERICA,
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WALTER KORPAN,
Respondent.

**RESPONDENT'S MEMORANDUM IN OPPOSITION TO
MOTION OF D. GOTTLIEB AND CO. FOR LEAVE TO
FILE BRIEF AS AMICUS CURIAE.**

The respondent, Walter Korpan, states his reasons for objecting to, and withholding his consent to, the motion of D. Gottlieb and Co. for leave to file a brief as *amicus curiae*, as follows:

1. The movant has failed to meet the requirements of Rule 42 (3) of this Court, by failing to set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case.

2. The movant in the brief proposed to be filed makes completely unsupported and undocumented statements and arguments and seeks to present, and in effect to introduce in this case for the first time, 32 "exhibits" which are not

part of the record in this case, which would not have been admissible if offered in the trial court, and which are completely unidentified as to source. The movant is attempting to retry the case on an *ex parte* basis in this Court free from the restrictions of the rules of evidence. An officer of the movant, D. Gottlieb & Co., was called as an expert witness on behalf of the United States upon the trial of this case in the District Court (R. 44-53) and had an opportunity to present any evidence admissible in this case.

3. If movant's brief is permitted to be filed, respondent will be deprived of the opportunity to meet and rebut this material except through the unusual and cumbersome procedure of requesting other manufacturers of coin-operated devices, and particularly those manufacturers whose devices are reproduced or discussed in movant's brief, to seek to file additional briefs as *amici curiae*, or in any event to provide respondent with the material necessary to rebut movant's material.

4. The movant has not shown that the questions in this case will be inadequately presented, but simply that the movant will gain a substantial competitive advantage if its games are taxed on the lower basis whereas those of its competitors are taxed at a higher rate. If the movant is permitted to introduce this extraneous issue, all other manufacturers should likewise be permitted to defend their legal and competitive position. Respondent has been informed by Lion Manufacturing Corp., which manufactured the games in issue in this case, and by several other manufacturers of coin-operated devices that they shall desire to seek to file briefs as *amici curiae* if this Court grants movant's motion. The record in this case should not be cluttered or the issues confused by a quarrel among competing manufacturers at the expense of respondent who is attempting to sustain in this Court the reversal by the

Court of Appeals of his indictment and conviction in a criminal case.

5. The simple question involved in this case is what Congress intended when it described "a so-called slot machine." The answer can be adequately and completely ascertained by examining the language of the statute and the traditional sources of legislative history, which counsel for both parties presented exhaustively before the Court of Appeals and intend to present in this court in great detail. This Court will receive no assistance whatsoever from the unsupported and undocumented opinions and speculations of one competitor as to what Congress intended.

Conclusion.

The motion of D. Gottlieb & Co. for leave to file a brief as *amicus curiae* should be denied. If it is granted, the briefs of other manufacturers who take a position directly contrary to that of the movant should be permitted to be filed. In any event, respondent's time for filing its principal brief should be enlarged so that respondent is given a full thirty days after this Court determines whether respondent must respond to the brief of *amicus curiae*, since *amicus curiae* did not file its motion until the day on which petitioner's brief was also filed.

Respectfully submitted,

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JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 596

UNITED STATES OF AMERICA,

Petitioner,

vs.

WALTER KORPAN,

Respondent.

BRIEF FOR WALTER KORPAN.

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IN THE
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OCTOBER TERM, 1956.

No. 596.

UNITED STATES OF AMERICA,

Petitioner,

vs.

WALTER KORPAN,

Respondent.

BRIEF FOR WALTER KORPAN.

QUESTION PRESENTED.

The correct question presented is: —

“Whether a pinball game is subject to the tax imposed by 26 U. S. C. (Supp. III) 4461(2) upon ‘so-called “slot” machines’ as defined in 26 U. S. C. (Supp. III) 4462(a)(2).”

SUMMARY OF ARGUMENT.

I.

The pinball games here involved are not subject to the \$250 tax imposed upon "so-called 'slot' machines." The holding of the Court of Appeals for the Seventh Circuit that the use by Congress of the well-known term "so-called 'slot' machines" did not intend to include the equally well-known "pinball game", was confirmed in its opinion both by the language of the statute and by a lengthy and uniform legislative history.

The term "slot machine" either means (a) any machine equipped with a slot for the reception of coins—a broad meaning, obscure and seldom-used, or (b) a machine in which the insertion of a coin releases a lever which when pulled activates a series of spring-driven drums or reels with insignia such as bells and fruit, known colloquially as a "one-armed bandit," which is the common, ordinary meaning.

Since Congress imposed a \$10 tax on any amusement or music machine "operated by means of the insertion of a coin, token, or similar object" and a \$250 tax only on "so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object," to apply the broad but obscure meaning to "so-called 'slot' machine" would render that clause redundant and meaningless.

Legislative history shows that Congress originally imposed the lower tax upon "so-called 'pin-ball' and other amusement machines" and the higher tax on "so-called 'slot' machines." In changing the lower tax category to "any amusement or music machine," Congress clearly expressed its intention that "under this amendment there

will be included *in addition to pin-ball machines*, a great variety of other machines * * * " H. R. Rep. No. 2333, 77th Cong., 2d Sess., p. 180 (1942).

Additional support for the construction of the statute adopted by the Court of Appeals is given by the Johnson Act, 15 U. S. C. Sec. 1171(a), which describes a "so-called 'slot machine'" as a device "an essential part of which is a drum or reel with insignia thereon."

Although the Treasury Department had issued in 1942 a regulation, T. D. 5203, which included pinball games in the category of devices taxed at \$250 as "~~so~~-called 'slot' machines," the regulation was not enforced. Contrary rulings were handed down by the Treasury Department (R. 89-91). The Department's forms indicated a contrary interpretation (R. 94). In any event the regulation was contrary to the plain meaning of the statute itself.

In addition to the language and legislative history of the statute, there are substantial economic and social reasons for the distinction by Congress in taxing slot machines at a high rate and pinball games at a low rate.

The games here involved have all of the structural and operating characteristics of pinball games and none of those of slot machines. They fit the dictionary and court definitions of pinball games, conform to the common understanding of pinball games, and are readily distinguished, by witnesses for both the United States and the respondent, from slot machines (R. 20, 60-1).

Pinball games provide entertainment and amusement whereas slot machines afford no amusement, except that of possibly receiving money, and within a few seconds part the player from his money. Slot machines are devices of pure chance whereas pinball games require the application of some skill on the part of the player.

The fact that persons may bet upon the result of a pin-

ball game or that the owner or possessor of the game may redeem free plays in money does not change the game from a pinball game into a "slot machine" as the term is used in Section 4462(a)(2).

II.

If the pinball games here involved are construed to be slot machines, the statute is unconstitutional and void since such a construction would inject such vagueness and uncertainty into a penal statute as to constitute denial of due process of law and would be arbitrary and discriminatory.

III.

In any event the respondent did not *wilfully* fail to pay the \$250 tax imposed by 26 U. S. C. Section 4461(2).

ARGUMENT.

I.

THE PINBALL GAMES HERE INVOLVED ARE NOT SUBJECT TO THE \$250 TAX IMPOSED UPON "SO-CALLED 'SLOT' MACHINES" AS USED IN 26 U. S. C. 4462(a)(2).

A. The Plain Meaning of the Language Used in the Statute and the Clear Intent of Congress in the Enactment Thereof Expressly Excludes Pinball Games from the Category of "So-Called 'Slot' Machines".

The Court of Appeals for the Seventh Circuit, in holding that the use by Congress of the well-known term "so-called 'slot' machine" in a taxing statute did not intend to include the equally well-known "pinball game," was confirmed in its opinion both by the language of the statute and by a lengthy and uniform legislative history.

By Section 4462(a)(1) of the Internal Revenue Code, a coin-operated device, taxable at the rate of \$10 per year, is described as follows:

"any amusement or music machine operated by means of the insertion of a coin, token or similar object . . ."

On the other hand, coin-operated devices, taxable at the rate of \$250 per year, are defined by Section 4462(a)(2) of the Code as follows:

"so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens."

The term "so-called 'slot' machines" is not further defined in the Internal Revenue Code.

The statutory categories being mutually exclusive, it is readily apparent that a coin-operated device, other than a "so-called 'slot' machine" is taxable at the rate of \$10 per annum. The respondent in this case paid the \$10 annual tax imposed by Section 4461 as to each coin-operated device in his possession. The United States contends, however, that the respondent should have paid \$250 per year as to each device on the theory that the respondent's coin-operated devices, which are commonly called pinball games, are in reality slot machines.

The plain meaning of the statute as well as every other test designed to determine the intent of Congress conclusively exposes the fallacy of the United States' theory.

Before examining the language of Section 4462(a)(2), it is important to note that the District Court fined the respondent \$750 (R. 97).⁶ Penal statutes are never to be enlarged by interpretation. *United States v. Five Gambling Devices*, 346 U. S. 441, 449, 452 (1953). In *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218 (1952), Mr. Justice Frankfurter said at pages 221-2:

"... when choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." (Emphasis added.)

Furthermore, in the construction of a taxing statute, all doubts are to be resolved in favor of the taxpayer. *United States v. Merriam*, 263 U. S. 179, 187-8 (1923). In *Gould v. Gould*, 245 U. S. 151 (1917), the Supreme Court said on page 153:

"In the interpretation of statutes levying taxes it is

the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the Government and in favor of the citizen."

1. The Plain Meaning of the Term, "So-Called 'Slot' Machines", as Used in the Statute, Does Not Embrace Pinball Games and Similar Devices.

The term "slot machine" has two separate and distinct meanings. In one sense, it refers to any machine equipped with a slot for the reception of coins. In this broad sense it includes food and drink vending machines, cigarette dispensers, pay telephones, turnstiles, parking meters, automatic phonographs and the variety of amusement games found in a penny arcade, none of which are embraced by the term used in the statute. In the advancing age of automation the ordinary citizen has daily contacts with a host of such "slot machines." This meaning is obscure and seldom if ever used.

The second meaning of the words "slot machine" is the usual one. It refers specifically to a machine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit. The operator has no control over the combination in which the insignia cease rotating and such combination determines whether the operator merely loses the coin he inserted or whether he wins additional coins in varying numbers. If coins are won, they are released from the machine and drop into a receptacle where they may be claimed by the operator (R. 60). Because this

type of machine is operated by a single handle and because the odds of the operator winning are so slight, it has been colloquially called a "one-armed bandit."

When Congress defined the types of devices subject to the \$250 per year tax in Section 4462(a) (2) as "so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object", it clearly and plainly did not refer to slot machines in their broad sense of all machines "which operate by means of insertion of a coin." This is obvious because the phrase "operated by means of the insertion of a coin, token, or similar object" is expressly set forth as a part of the statutory definition of *both* of the types of machines which are subject to the tax imposed by these sections of the Code. In other words, no device is within either of the definitions set forth in Section 4462(a) of the Code, and no device is subject to the taxes imposed by Section 4461 unless it is a "slot machine" in the sense that it is operated by means of the insertion of a coin, token or similar object. But the phrase "so-called 'slot' machine" is expressly contained in the definition of devices subject to the \$250 tax. Clearly, the use of that language is redundant and even anomalous if its meaning is no different from that of the phrase, "operated by means of the insertion of a coin, token or similar object." It follows, that if the redundancy is to be avoided and if any meaning is to be given to the language which Congress has adopted in this instance, then the phrase "so-called 'slot' machine" must necessarily have been used in the narrower sense of describing a "one-armed bandit". This is the common, ordinary meaning of "slot machine"; it is the only meaning which can give effect and substance to the statutory language.

Every other word and phrase in Section 4462(a) confirms this interpretation. If Congress intended (a)(2) to refer to slot machine in its broad sense, the word "so-

called" would be surplusage and entirely unnecessary. Webster's New International Dictionary, 2d edition, 1955, defines "so-called" as

"Commonly named; thus termed;—implying doubt as to the correctness or propriety of so designating the person or thing."

If Congress intended "slot machines" to mean any machine with a coin slot, it would have had no occasion to imply a more restrictive meaning by use of the adjective "so-called." The same argument can be applied to the use by Congress of quotation marks in the term "so-called 'slot' machines." By emphasizing the word "slot", particularly in the phrase "so-called 'slot' ", Congress plainly indicated that it intended that "slot" be used in a sense other than as a mere coin receptacle, but rather in the colloquial sense of a "one-armed bandit." This construction receives support from the common slang contraction of slot machines as "slots." A "slot" is a one-armed bandit and nothing else. Every word used in a statute is presumed to have a meaning and purpose, and, if possible, every word must be accorded significance and effect. *Washington Market Co. v. Hoffman*, 101 U. S. 112; *Adler v. Northern Hotel Co.*, 175 F. 2d 619, 621 (C. A. 7th, 1949)..

Looking at the words in Section 4462(a)(2) following and further defining "so-called 'slot' machines" also bolsters the construction that Section 4462(a)(2) applies to one-armed bandits only. They are machines

"which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens."

The purpose of Congress in adding the language after the words "so-called 'slot' machine" was undoubtedly to define those words. There is nothing in this definitive lan-

guage extending the meaning of slot machines beyond one-armed bandits. Another possible purpose for the definitive language was to exclude from the \$250 tax category toy slot machines, used for amusement, which do not deliver or entitle the player to receive cash, premiums, merchandise or tokens.

If Congress intended to draw a line between "coin-operated amusement devices" taxable at \$10 and "coin-operated gaming devices" taxable at \$250, as the United States contends (Brief for the United States, pages 26-7), Congress could have said so as simply as that without the use of the words "so-called 'slot' machine." Actually the statute reads in part as follows:

"* * * The term 'coin-operated amusement or gaming device' means—(1) any amusement or music machine * * * and (2) so-called 'slot' machines * * *." (Emphasis added.)

The word "term" is singular and not plural which would imply that the quoted phrase "coin-operated amusement or gaming device" is one inclusive thing. Sub-paragraphs (1) and (2) are joined by "and". While it is a natural error, after reading the sections, to divide these phrases in chronological order and to assume that sub-paragraph (1) pertains solely to "amusement devices" and that sub-paragraph (2) pertains to "gaming devices", actually sub-paragraphs (1) and (2) are conjunctive definitions of one phrase—"coin-operated amusement or gaming device"—and the only purpose of the two definitions is to divide the devices into those subject to the \$10 tax and "so-called 'slot' machines" subject to the \$250 tax.

The United States' interpretation amounts to an attempt to change the wording of Section 4462(a)(2) of the Code to read as follows:

"So-called 'slot' machines and any other devices, which operate by means of insertion of a coin, token

or similar object and which, by application of the element of chance, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens." (Italicized words supplied.)

The statute, however, does *not* so read. As passed by Congress, it refers only to "so-called 'slot' machines" and establishes certain additional criteria for the imposition of the \$250 tax on these machines. The words "and any other devices" do *not* appear in the existing Section 4462(a)(2).

The plain meaning of the statutory language thus leads to the inescapable conclusion that the \$250 tax imposed under Section 4461 of the Code is applicable only to "one-armed bandits". It is not applicable to other coin-operated mechanisms which lack the essential elements of those devices.

2. The Legislative History of the Statute Manifests the Clearly Expressed Congressional Intent to Exclude Pinball Games from the Category of Devices Taxable as Slot Machines.

If any doubt existed as to the plain meaning of the statutory language, that doubt is resolved by an examination of the legislative history of these provisions of the Code. In *United States v. American Trucking Associations, Inc.*, 310 U. S. 534 (1940), the Supreme Court said at pages 543-44:

"When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' "

The interpretation of the statutory language, discovered in its plain meaning, is fully borne out by an examination of the legislative history of Sections 4461 to 4463 of the

Internal Revenue Code. These sections were first proposed by the House of Representatives of the 77th Congress as part of the Revenue Revision of 1941. As passed by the House, H. R. 5417, Section 555, assessed a tax of \$25 on each "coin-operated amusement and gaming device". That term was defined as including:

"(1) so-called 'pin-ball' and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object, and

"(2) so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens."

The House obviously understood that pinball machines and slot machines were not the same, despite the fact that it imposed a uniform \$25 tax on each. If pinball machines were included in the general classification of slot machines, it was wholly unnecessary to mention them in a separate clause.

At subsequent hearings before the Senate Finance Committee, representatives of the coin machine industry appeared and emphasized that the proposed tax upon amusement machines was not economically feasible and that its imposition would result in a probable loss of revenue by removing thousands of such machines from circulation (Hearings before Senate Finance Committee on H. R. 5417, 77th Cong., 1st Sess., pp. 1210-1215 (1941)). The Senate was obviously impressed by this possibility. The proposed bill, as passed by the Senate, accepted the classification of

1. The report of the Ways and Means Committee also treated slot machines and pinball machines as separate categories. The report stated: "'Coin-operated amusement or gaming devices' are briefly, machines which fall within the general classification colloquially referred to as 'pin-ball' machines and 'slot' machines." H. R. Rep. No. 1040, 77th Cong., 1st Sess. p. 60 (1941).

pinball machines as separate and apart from slot machines, and reduced the tax on the former to \$10 per machine while increasing the tax on the latter to \$50 per machine. The report of the Senate Finance Committee emphasized the basic intention to distinguish pinball machines from slot machines. It stated that:

"The House bill places a special tax of \$25 per year upon each coin-operated amusement or gaming device maintained for use on any premises.

"Your Committee divides these devices into two categories. Upon so-called pin-ball or other amusement devices operated by the insertion of a coin or token, the tax is reduced to \$10 per year. Upon so-called slot machines, however, the tax is placed at \$200 per year."²

The conference report was in accord in its understanding of the Senate amendment. The report (H. R. Rep. No. 1203, 77th Cong., 1st Sess. p. 18. (1941)) stated that, "the amendment establishes two different rates of tax: \$10 per annum in the case of a pinball game, or similar game or amusement machine, and \$50 with respect to so-called slot machines, the operation of which involves an element of chance." The House accepted the Senate amendments and the bill became law as Section 3267 of the Internal Revenue Code of 1939 (Public Law 250, 77th Cong., 1st Sess.).

Thereafter, in response to increased demands for tax revenue brought about by the outbreak of war, many new excise taxes were adopted by enactment of the Revenue Act of 1942, and the \$10 tax on pinball machines was extended to other amusement devices and to coin-operated music machines. This was done by amending the original

2. Sen. Rep. No. 673, 77th Cong., 1st Sess. p. 21 (1941). See also p. 55.

definition of the 1941 House bill to describe "any amusement or music machine * * *,"³

But the enlargement of the category of machines subject to the \$10 tax did not remove pinball machines from that classification. On the contrary, the Congressional reports on the amendment reaffirmed the intention to continue the inclusion of pinball machines under the \$10 tax. In H. R. Rep. No. 2333, 77th Cong., 2d Sess., p. 180 (1942), it was stated:

"This section amends Section 3267 of the Code by defining 'coin-operated amusement devices' to include all amusement machines and music machines operated by means of the insertion of coins, tokens, or similar objects. Under this amendment there will be included *in addition to pin-ball machines* a great variety of other machines, such as baseball and football games, machine-gun games, music machines (so-called juke boxes), and many other types of coin-operated games."⁴

With the exception of periodic increases in the rate of taxation and technical changes of form adopted in 1954, the provisions of former Section 3267, as amended in 1942, remain unchanged as Sections 4461 to 4463 of the present Revenue Code.

Nothing in the 1941 and 1942 Revenue Acts or in the Committee Hearings and reports on those Acts suggests an intent to include pinball machines in a broader classi-

3. H. R. 7387, Sec. 617, 77th Cong., 2d Sess. (1942). In order to placate the fears of some manufacturers who were worried that their machines might be subject to the higher tax, the 1942 Act also specifically stated that certain gum-vending machines which contained some of the characteristics of slot machines would not be taxed as slot machines. See Hearings before Senate Finance Committee on H. R. 7378, 77th Cong., 2d Sess., pp. 1135-41 (1942).

4. Emphasis added. See also Sen. Rep. No. 1631, 77th Cong., 2d Sess. p. 266 (1942), which again refers to the "tax of \$10.00 per year with respect to so-called pinball and other similar machines."

fication as one of a variety of slot machines. Surely it would have been meaningless to refer to pinball machines by name and to classify them separately for tax purposes if they were also includible within the slot machine category.

It is pertinent to note that at the hearings before the Committee on Ways and Means as recently as on August 5, 1953, Congressman Eberharter said (Hearings, 83rd Cong., 1st Sess., p. 2517):

"What we intended was to tax one-armed bandits \$250." (Emphasis added.)

The Court of Appeals examined and considered the legislative history of the taxing statute in great detail and quoted extensively from Congressional committee reports (R. 115-117), which are, as a rule of statutory interpretation, to be given greater weight than the statements of individual Congressmen on the floor of Congress. *United States v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U. S. 310 at 318; *Lapina v. Williams*, 232 U. S. 78 at 90; *Jefferson v. United States*, 178 F. 2d 518 at 520, aff'd. in 340 U. S. 135; *Nicholas v. Denver and Rio Grande Western R. Co.*, 195 F. 2d 428 at 431; *Gan Seow Tung v. Carusi*, 83 F. Supp. 480 at 431. In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951), Mr. Justice Jackson said in a concurring opinion at pages 395-6:

"Resort to legislative history is only justified where the face of the act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. * * * But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions."

However, an examination of debate on the floor of Congress in its full context merely serves to strengthen the result reached by the Court of Appeals. The United States quotes a portion of the debate which occurred in the Senate on September 4, 1941 (87 Cong. Rec. 7298, 7301; Brief for the United States; pages 28-30).

On the same day, September 4, 1941, that the language quoted in the Brief for the United States was uttered, Senator Clark of Missouri and other Senators made other statements which clearly reinforce the opinion of the Court of Appeals:

"Mr. Clark of Missouri. * * * But at the same rate the Ways and Means Committee included the so-called one-armed bandits, which are notoriously a racket. I refer to the machines with the lemons, plums, oranges, and what-not, which are notoriously gambling machines. Such machines were put in the same category in the tax bill.

"But in the same category were also included the 'one-armed bandits', which have been a racket in every state of the Union except the very few States in which they have been legalized—in my opinion, to the disgrace of those States.

"Then, Mr. President, I am proud to say that on my motion the tax on the 'one-armed bandits' was increased from \$25 to \$200." 87 Cong. Rec. 7298.

"Mr. Bailey. * * * The purpose of the amendment is to bring about the prohibition of gambling through the 'one-armed bandits' or to bring an end to robbery through the 'one-armed bandits.'" 87 Cong. Rec. 7298.

"Mr. Clark of Missouri. * * * Almost universally in the lowest-income brackets the poorest people send children to the grocery store to buy groceries, and

they are attracted by the prospect of return from these—two lemons or two oranges, or two prunes, or whatever they may be.” 87 Cong. Rec. 7300.

“Mr. Clark of Missouri. * * * The House provision proposes to raise the same rate of revenue from ‘one-armed bandits’ as from the little, innocent pinball machines.” 87 Cong. Rec. 7300.

“Mr. Clark of Missouri. * * * I am frank to say that my purpose in offering in the Finance Committee the amendment imposing a tax of \$1,000 on slot machines was to make the rate absolutely prohibitive, and put these ‘one-armed bandits’ out of business.” 87 Cong. Rec. 7300.

The pinball games considered by the Court of Appeals are not one-armed bandits and they do not have lemons, plums, oranges and prunes.

3. The Use of the Term, “Slot Machines,” as Descriptive of Only One-Armed Bandits Is Further Demonstrated by an Examination of a Statute in *Pari Materia*.

The Supreme Court of the United States has consistently held that when two acts are in *pari materia*, the one passed later may be used as an aid in interpreting the earlier. See *United States v. Freeman*, 3 How. (U. S.) 556, 564 (1845); *Tiger v. Western Investment Co.*, 221 U. S. 286, 309 (1911); and *Great Northern Ry. v. United States*, 315 U. S. 262, 276 (1942).

It is significant that Congress, in connection with the only other appearance in the Federal statutes of the term “so-called ‘slot’ machines”, has unequivocally adopted the commonly accepted definition of that term.⁵ The John-

5. The only state statute comparable to 26 U. S. C. 4461-4462 is described in Federation of Tax Administrators Research Report No. 24, *State Taxes on Gambling* (February 15, 1949), as follows on pages 8-9, 11: “Washington. This statute dis-

son Act, passed on January 2, 1951, which prohibits the interstate shipment of slot machines, defines "gambling device" as including "any so-called 'slot machine' or any other machine or mechanical device *an essential part of which is a drum or reel with insignia thereon.*"⁶

Nor can it be contended that Congress in its earlier passage of the occupational tax on coin-operated devices should have added the phrase "an essential part of which is a drum or reel with insignia thereon" after the words "so-called 'slot machine'." In the Johnson Act the definition of a "gambling device" includes "any so-called 'slot machine' or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon." In the tax act, the \$250 tax is applicable *only* to "so-called 'slot' machines." Both acts plainly refer to one-armed bandits of conventional form. The Johnson Act goes a step further and also includes one-armed bandits disguised in some other form.

The Johnson Act is additional support of the interpretation of the Court of Appeals which is based primarily

tinguishes between coin operated gambling games which require some element of skill in playing and those which pay out on a pure chance basis. As skill games, the Washington tax classifies such devices as 'payout' pinball machines, iron claw machines, and traveling cranes. The 'pure chance' category is comprised of devices of the 'one-armed bandit' variety: * * * The Washington tax uses as its measure gross operating income which is defined as the gross amount paid into the machine less the amount paid out as winnings. Other than 'payouts' no other deductions are permitted in computing the tax base. * * * The suggestion has been made that administration of a tax of this type would be facilitated considerably if a meter could be installed on each machine to record its total receipts."

6. 15 U. S. C. Sec. 1171(a); emphasis added. See also the House Report which states that, "Paragraph (1) of the definition deals with machines and mechanical devices commonly known as slot machines. These machines commonly employ drums or reels with insignia thereon which are activated either mechanically or in some other manner as, for example, by electric power." H. R. Rep. No. 2769, 81 Cong., 2d Sess. (1950).

upon the language of Section 4462(a)(2) and its legislative history.

4. The Legislative Distinction Between Pinball Games and Slot Machines Was Long Recognized in the Administrative Interpretation of the Statute by the Treasury Department.

For many years the Treasury Department itself recognized the statutory distinction between pinball games and slot machines. Treasury Department Form 11-B (Resp. Ex. 1; R. 81, 94), which is the special return used in connection with the tax on coin-operated amusement and gaming devices, formerly described the statutory categories as follows:

“Coin-operated AMUSEMENT DEVICES (pinball and all other amusement or music machines) * * *

“Coin-operated GAMING DEVICES (slot machines and all other machines involving an element of chance).”

According to the testimony of the United States' witness, a miscellaneous tax technician employed by the District Director of Internal Revenue, it was not until 1952 that Form 11-B was revised to omit the express reference to pinball machines (R. 12; Resp. Exs. 1 and 2; R. 81, 94, 95).

T. D. 5203 was issued late in 1942. The fact remains, however, that as far as counsel for respondent have been able to determine, no attempt was made to prosecute a failure to pay the \$250 tax with respect to pinball games prior to about the time this case was commenced. At the trial, counsel for respondent read into the record photostatic copies of letters dated late in 1951 clearly indicating that T. D. 5203 was not being enforced almost ten years after its promulgation (R. 89-91).

The Treasury Department's interpretation of the statute and its relation to private arrangements by a proprietor to pay cash in connection with a device not designed for

such payments, was given by the Collector of Internal Revenue at Indianapolis in an opinion dated August 17, 1951 (R. 89-90):

"Reference is made to your letter of August 15, 1951, stating that you are operating a machine referred to as one ball. It does not have a slot paying money in case of a winning score. The player can refuse the free game or games and take cash. The cash is given by the operators of the establishment where the machine is placed. This is the arrangement made between yourself and the proprietor of the establishment. There is nothing on the machine explaining this or anything else concerning a prize.

"You are advised that in this connection the Commissioner of Internal Revenue has held *that the machine must deliver to the person playing, cash, tokens, premiums, or merchandise, or tokens. In other words, the machine must have a legend inscribed thereon notifying the player what he is to receive.* Private arrangements between the player and the proprietor would not bring the machine within the classification of a gaming device.

"From the information submitted, these machines would only be subject to the coin operated amusement device special tax." (Emphasis supplied.)

In *Casey v. Sterling Cider Co.*, 294 F. 426 (1st Cir., 1923) the court said (p. 429):

"Furthermore counsel for the defendant has presented photostatic copies of letters coming from the office of the Commissioner of Internal Revenue in the Treasury Department, written in October, 1917, and September, 1918, before and after the promulgation of regulation 44, stating that sweet cider was not taxable under the act of 1917; and he further states, without contradiction, that while the regulation may have been enforced in some places, it was not generally throughout the country, all of which indicates that there was no uniform enforcement of or general acquiescence in the regulation as the true construction of section 313(b)."

Moreover, T. D. 5203 is clearly inconsistent with the provisions of section 4462(a)(2), limiting the \$250 tax to "so-called 'slot' machines." It is elementary law that a Treasury Regulation which is inconsistent with a provision of the Internal Revenue Code has no force and effect. *Buscy v. Deshler Hotel Co.*, 130 F. 2d 187 (6th Cir. 1942); *F. H. E. Oil Co. v. Commissioner*, 147 F. 2d 1002 (5th Cir. 1945). Since it not only conflicts with the statute but also was never followed, T. D. 5203 has no bearing upon this case. Therefore it cannot be argued that Congress reenacted Sections 4461 to 4463 in the light of T. D. 5203. On the contrary, it may fairly be said that the reenactment was effected with knowledge by Congress of the Treasury Departments' non-adherence to T. D. 5203.

5. The Exclusion of Pinball Games from the Category of Slot Machines Is Founded Upon Substantial Economic and Social Distinctions.

There are substantial economic and social reasons for differentiating between slot machines and pinball games. These reasons were presented to Congress during the public hearing which led to the passage of the Occupational Tax on Coin-Operated Devices and undoubtedly were the factors which resulted in the clear intent of Congress to levy a \$250 per year tax on slot machines and a \$10 per year tax on pinball machines and other amusement devices.

The House Committee Report upon the bill later enacted as the Johnson Act (64 Stat. 1134, 15 U. S. C. Secs. 1171-1177), prohibiting shipment of gambling machines in interstate commerce, recited that slot machines were resulting in substantial revenues to nation-wide crime syndicates. H. R. Rep. No. 2769, 81st Cong., 2d Sess. pp. 4-6; *United States v. Five Gambling Devices*, 346 U. S. 441, 450, footnote 13. (1953). In an article entitled "Slot Machines and Pinball Games" which appeared in 269 Annals of the

American Academy of Political and Social Science 62 (May, 1950), the editor stated that "this article is written by thoroughly competent persons whose names, by reason of their present connection with an investigation of slot-machine operations, are not here disclosed." At page 68, these authors comment upon the erroneous impression that there is any connection between the slot machine business and the pinball business and they conclude:

"However, the pinball business is today part of the coin-operated amusement industry.

"After the war it became apparent to the manufacturers that the pinball game's greatest appeal was as an amusement device, and that the majority of pinball machines in the country were being so operated.

"Because the general public often links the pinball machine with the slot-machine racket, anti-slot-machine campaigns have often resulted in subjection of pinball games to restrictive legislation and high taxes

"The pinball and other amusement machine manufacturers are determined to divorce themselves from the gambling part of the coin-machine industry, and . . . have embarked on a vigorous anti-slot-machine-antigambling program."

The Federation of Tax Administrators, an organization composed of the revenue commissioners of the forty-eight states, in its Research Report 24, entitled "State Taxes on Gambling," published February 15, 1949, states that pinball machines are designed for diversion only and "comprised essentially a reputable branch of the amusement industry" (page 14).

The Hearings before the Senate Finance Committee on H. R. 5417, 77th Cong., 1st Sess., leading to the passage

of the Occupational Tax on Coin-Operated Devices, contained the following at page 1211:

"The average life of a slot machine in productive use is at least 5 years—there being on location today, any number of such machines which are 10 to 15 years old and older. Amortization and depreciation are figured roundly at the rate of a few pennies per week.

"On the other hand, the life of a pinball machine rarely exceeds 4 months of top productive use, after which it must be placed in outlying areas where the income is greatly reduced. After several months additional use, its value is practically nil. The cost of a pinball machine must be entirely amortized within a period of from 9 to 12 months—the greatest portion of the depreciation and amortization taking place during the first 4-month period."

B. The Games Here Involved Are Pinball Games and Not "So-Called 'Slot' Machines".

1. The Coin-Operated Machines Involved Herein Are Typical Pinball Machines, Having None of the Structural or Operating Characteristics of Slot Machines.

The coin-operated machines introduced into evidence as United States Exhibits 3, 4 and 5 were pinball games of the type known as "bingo" or "in-line" games and were further identified by the manufacturer, the Bally Manufacturing Company, as the "Hi-Fi", "Variety" and "Gaiety" machines (R. 56, 80). Each of the games consisted of a horizontal playing surface containing obstacles and apertures, and a vertical scoring board upon which the player's score and other aspects of the game are recorded. The machines were made operative by the insertion of one or more coins. A complete game is played by propelling five or more steel balls across the playing surface. As each ball enters a numbered aperture on the playing surface, a corresponding light on the scoring board is illuminated, and upon illumination of three or more lights

in any horizontal, vertical or diagonal row the player is awarded one or more "free plays"; i.e., the right to continue playing the game without the insertion of additional coins (R. 56-61, 112).

These devices are nothing more nor less than typical pinball games. They correspond in every respect to the concept of that term as it has always been known in the trade and by the public generally, clearly distinctive from and in contrast to the so-called "slot machine" or "one-armed bandit". The games here involved are precisely described by the dictionary definition of a pinball machine (Webster's New World Dictionary of the American Language (1951)):

"A game of chance played on an inclined board, typically containing a number of holes surrounded by numerous pins, springs, etc., and marked with scores credited to the player if he causes a number of spring-driven balls to strike the pins or roll into the holes".

The games here involved were located in the State of Illinois, whose highest court has held that they are pinball games. On March 20, 1957 the Supreme Court of Illinois held in *People v. One Mechanical Device*, Docket No. 34029, that a pinball game, substantially the same as the three games here involved and made by the same manufacturer, was not a gambling device within the meaning of the Illinois Gambling Device Act, even though the machine was designed ~~and constructed to~~ award free plays which could be played off by winners. The Court said:

"In summary it may be said that the device is a typical pinball machine."

The United States itself, in framing the question presented in this case, instinctively and correctly called the games involved in this case "pin-ball machines" (Petition for Writ of Certiorari, page 2) but in its brief the question

has been re-worded so that "pin-ball machines" are now called "mechanical games" (Brief for the United States, page 2).

There are marked structural and operating differences between pinball games and slot machines. It is nowhere suggested that the games in question contained spring-driven drums or reels with insignia or any of the other characteristics which are hall-marks of the classic slot machine.

It is not an exaggeration to state that any average person can readily distinguish between a slot machine and a pinball game (R. 20). One of the witnesses for the United States in this case testified that a slot machine "has cylinders that rotate after you pull a lever" and that the games here involved are "entirely different than a slot machine" (R. 20). The respondent's witness testified in detail as to the differences between slot machines and pinball games (R. 60-1).

In *United States v. Ansani*, opinion dated January 15, 1957 (C. A. 7), pending on petition for certiorari, No. 813, this Term, the Court of Appeals stated at page 3 of the slip opinion:

"A slot machine is not a gambling device merely because it has coin slots or an automatic pay off mechanism. It is a gambling device because its function and design are to allow one to stake money or any other thing of value upon the uncertain event of achieving the winning combination of insignia." (Emphasis added.)

The Supreme Court of Illinois said in *People v. One Mechanical Device*, Docket No. 34029, decided on March 20, 1957:

"Whereas a slot machine or a crap table entails no skill whatever, affords no amusement beyond that which the player enjoys when he is paid money, and

within a few seconds parts the player from his money through his expectation of winning additional money, a pinball game is essentially an amusement game which can be, and frequently is, played for long periods of time with no reward to the player beyond the enjoyment of playing."

In *Chicago Patent Corporation v. Genco, Inc.*, 124 F. 2d 725 (C. C. A. 7th, 1941), the defendant, being sued for the infringement of a patent protecting free-play pinball machines, argued that these devices were gambling machines without utility and therefore beyond the protection of the patent laws. The Court of Appeals affirmed the finding of the lower court that the games were capable of legitimate use and that skill was not absent in the operation of the game, and that therefore the games were not gambling machines.

There is nothing unusual about the games here involved nor any reason why they are not typical pinball games. Although the Brief for the United States may give the impression (page 6) that the devices themselves show that players may be entitled to certain monetary amounts upon scoring free games, neither the backboard nor any other part of these games indicates that monetary amounts will be paid to players who have succeeded in scoring free games nor that a successful player shall be entitled to receive cash, premiums, merchandise, or tokens (United States Exs. 3, 4 and 5; R. 41). The officer of a corporation which manufactures devices competing with those here involved (R. 44-6), who admitted that he had a limited knowledge of the mechanism of the devices in this case (R. 46), testified that the reflex unit more or less balances out the high winnings as against the small winnings (R. 50). The engineer for the company which manufactured the games in this case, who had been with that company for 24 years (R. 54, 56) testified that the reflex unit does

not reduce the opportunity of winning in any manner (R. 62-3). The meter which records free plays not used by the player of the machine simply tabulates games which the machine owes the player. For example, if a player has registered his right to receive a certain number of free plays and then discontinues playing because he is unable or unwilling to continue at that time or in order to permit another player to intervene, the free plays are "knocked-off" the machine and recorded on the meter. When the player to whom the games are owed returns to play, the only procedure by which the location owner can give him the games to which he is entitled is by inserting coins to activate the machine or by handing the coins to the player to insert (R. 79). Since the location owner is entitled to receive these coins back from the owner of the machine, the meter is necessary to record the number of games handled in this manner. Furthermore, the meter is used to record payouts in jurisdictions where payouts are lawful (R. 79). See footnote 5 on pages 17-8 of this brief.

Neither the reflex unit nor the meter nor any other structural or operating feature of the pinball games here involved transform those games into slot machines with pull levers, drums or reels, insignia, or any of the other distinctive features of slot machines described in the succeeding sections of this brief.

2. The Machines Herein Are "Amusement" Devices, Not "Gaming" Devices.

The United States erroneously distinguishes between "amusement devices" and "gaming devices" instead of between "pinball games" and "slot machines." Nevertheless, the pinball games here involved *are* amusement devices and slot machines are gaming devices.

Slot machines are pure gambling devices. The player inserts a coin and pulls a lever, betting that the revolving

drums will come to rest in a combination which will deliver to him more coins than he put into the machine. He has no control over the device. Obviously, amusement does not result from watching the drums revolve for a few seconds.

In contrast, the machines with which this Court is concerned are essentially amusement devices. The player believes—or at least hopes—that he can so control the games that a designated score will be achieved. The element of chance or luck, far from being the controlling factor, is only an incidental feature which in part contributes to the amusement and attraction of the game.

Webster's New International Dictionary, Second Edition, defines "amusement" as:

"Pleasurable diversion; entertainment, especially when characterized by quiet mirth; hence the state of being amused, as by something droll or humorous; that which amuses or entertains."

Black's Law Dictionary, Third Edition, defines "amusement" as:

"Pastime; diversion; enjoyment."

The cases cited by the United States at pages 23 to 25 and in footnote 2 on page 17 of its brief have no applicability here. They hold that particular pinball games are gambling devices *under the applicable State gambling statutes*. The issue before this Court is whether pinball games are "so-called 'slot' machines" within the meaning of Section 4462. The pinball games involved here clearly fall within the statutory language of Section 4462(a)(1) as "any amusement . . . machine operated by means of the insertion of a coin, token, or similar object" and are subject only to the \$10 per year tax which has been paid.

Nevertheless, if this were the issue, which it is not, it is possible to cite an equal number of cases which hold that

under applicable State gambling statutes, pinball games are *not* gambling devices,⁷ are *not* lotteries,⁸ and that the awarding of free plays does *not* convert the device into a gambling device.⁹

The highest court of the State of Illinois, where the games here involved were located, held that substantially similar games were not gambling devices and that the awarding of free plays did not convert them into gambling devices. The Supreme Court of Illinois held in *People v.*

7. Cases holding that pinball machines are not gambling devices: *Commonwealth v. Mihalow*, 142 Pa. Super. 433, 16 A. 2d 656 (1940); *Williams v. State*, 65 Ga. App. 843, 16 S. E. 2d 769 (1941); *Chicago Patent Corporation v. Genco, Inc.*, 124 F. 2d 725 (C. C. A. 7th, 1941); *State v. Waite*, 156 Kan. 143, 131 P. 2d 708 (1942); *Childs v. State*, 70 Ga. App. 99, 27 S. E. 2d 470 (1943); *Brafford v. Calhoun*, 51 N. E. 2d 920 (Ohio Ct. App., 1943); *State of Kansas v. One Bally Coney Island No. 21011 Gaming Table*, 258 P. 2d 225 (Kansas, 1953); *Crystal Amusement Corp. v. Northrop*, 118 A. 2d 467 (Conn. Com. Pl., 1956); *People v. One Mechanical Device*, Docket No. 34029, opinion dated March 20, 1957, Supreme Court of Illinois, overruling *People v. One Pinball Machine*, 316 Ill. App. 161 (cited in Brief for the United States, page 17, note 2).

8. Cases holding that a pinball machine is not a lottery: *Gayer v. Whelan*, 59 Cal. App. 2d 255, 138 P. 2d 763 (1943); *Lee v. City of Miami*, 121 Fla. 93, 163 So. 486 (1935); *Ex Parte Pierotti*, 43 Nev. 243, 184 Pac. 209 (1919). Cf. case holding that a slot machine is a lottery: *State v. Brotherhood of Friends*, 247 P. 2d 787 (Wash., 1952).

9. Cases holding that the awarding of free plays does not convert device into a gambling device: *Washington Coin Machine Assn. v. Callahan*, 142 F. 2d 97 (C. A., D. C.); *Chicago Patent Corporation v. Genco, Inc.*, 124 F. 2d 725 (C. C. A. 7th); *Davies v. Mills Novelty Co.*, 70 F. 2d 424 (C. C. A. 8th); *Mills Novelty Co. v. Farrell*, 64 F. 2d 476 (C. C. A. 2d); *State v. Waite*, 156 Kan. 143, 131 P. 2d 708; *State v. One Bally Coney Island No. 21011 Gaming Table*, 174 Kan. 757, 258 P. 2d 225; *State v. Betti*, 23 N. J. Misc. 169, 42 A. 2d 640; *Overby v. Oklahoma City*, 46 Okla. Cr. 52, 287 Pac. 796; *In re Wigton*, 151 Pa. Super. 337, 30 A. 2d 352; *Commonwealth v. Kling*, 140 Pa. Super. 68, 13 A. 2d 104; *State v. One "Jack and Jill" Pinball Machine*, 224 S. W. 2d 854 (Mo. App.); *Crystal Amusement Corporation v. Northrop*, 19 Conn. Supp. 498, 118 A. 2d 467.

One Mechanical Device, Docket No. 34029, decided on March 20, 1957, as follows:

"A pinball game which does not pay out money or anything else of value and therefore on which money cannot be staked, hazarded, bet, won or lost, is not a gambling device and does not fall within the prohibition of the statute. *People v. One Slot Machine*, 303 Ill. App. 337."

The Court further said:

"We are of the opinion that a free play is neither money, the equivalent of money, nor a valuable thing. It is unrealistic to hold that the possibility of winning a greater or lesser amount of amusement is gambling because if it were, most amusement games would be barred by the statute."

In the case of *In re Mapakarakes*, 8 N. Y. S. 2d 826 (Sup. Ct., Spec. Term, N. Y. County, 1938), cited by the United States at page 24 of its brief, the court said at page 827:

"Certain principles regarding the operation of these pin ball machines seem to be established. Primarily, they are not ipso facto illegal gambling devices under Article 88, section 970 et seq., of the Penal Law."

Thus although the question of whether a pinball game is or is not a "gaming" device is not determinative of whether it is a "so-called 'slot' machine," it is clear that slot machines are universally held to be gaming devices whereas most jurisdictions construe pinball games to be "amusement" devices.

The United States argues in its brief nevertheless (pages 16-17) that respondent's machines are "gaming devices" and cites five Federal cases to sustain that proposition. Two of the cases cited are clearly inappropriate, *United States v. 24 Digger Merchandising Machines*, 202 F. 2d 647 (8th Cir. 1953); *United States v. 10 Digger Machines*,

109 F. Supp. 825 (D. C. E. D. Mo. 1952). These are cases under the Johnson Act. By an additional paragraph (15 U. S. C. § 1171(a)(2)) that Act defines "gambling device" to include not only so-called slot machines but also "any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token or similar object and designed and manufactured so that when operated *it may deliver*, as a result of the application of the element of chance, any money or property" (Emphasis added). These "digger" machines were held to fall within the additional paragraph; the pinball games here involved do *not* deliver money or property and hence would not fall within the additional paragraph of the Johnson Act. *United States v. 19 Automatic Pay-Off Pin-Ball Machines*, 113 F. Supp. 230 (W. D. La.), cited by the United States in footnote 2 on page 17 of its brief, likewise arose under the Johnson Act and the machines involved contained payout mechanisms within the express language of that Act. *Johnson v. Phinney*, 218 F. 2d 303 (5th Cir. 1955), cited in United States' Brief in footnote 1 on pages 16-7, is distinguishable since the issue arose out of the applicability of the wagering tax, which expressly excludes coin-operated devices. The devices in that case were not coin-operated such as the games here involved which are taxed by Section 4462 of the Internal Revenue Code. *Tooley v. United States*, 134 F. Supp. 162 (D. C. Nev. 1955), turned solely on the question of whether chance played a part in the operation of the "boom and claw." The court in the *Tooley* case did not pass upon the meaning of the words "so-called 'slot' machine"; it merely held that in that particular device the "element of chance preponderates over the element of skill." None of these cases lends any assistance to the determination of the issue in the present case.

3. Slot Machines Are Devices of Pure Chance Whereas Pinball Games Require the Application of the Skill of the Player.

The use of the words "skill" or "chance" in anti-gambling statutes has caused courts throughout the country to become involved in endless exercises in semantics. Most of the debates have centered around statutes prohibiting games of chance or prohibiting all games except games of skill. Some courts have construed particular statutes to require the prohibition of any game containing *any* element, however slight, of chance. Other courts have observed that some element of chance exists in every occurrence. The Supreme Court of Illinois in upholding in *People v. Monroe*, 349 Ill. 270 (1932) the validity of a statute authorizing the pari-mutuel system of betting on horse racing, said at page 275:

"Every event in life and the fulfillment of every lawful contract entered into between parties is contingent to at least some slight extent upon chance. No one would contend, however, that a contract knowingly and understandingly entered into between two parties is a gaming contract merely because its fulfillment was prevented as the result of the befalling of unknown or unconsidered forces, or by the issue of uncertain conditions, or by the result of fortuity."

Some courts have interpreted specific statutes as prohibiting games in which chance predominated over skill and as permitting games in which skill predominated over chance. Other courts have interpreted local statutes as prohibiting only those games in which there is no skill and where the operation depends entirely upon chance. None of these statutes nor the cases interpreting them lend any assistance to a determination of what Congress intended in 26 U. S. C. 4462(a)(2), except indirectly by showing the utter futility of attempting to enforce a statute where the administrator must measure how much skill and how much chance enter into a particular operation.

Although chance enters into the operation of a pinball game as it does in "every event in life," skill is also a factor to a degree, which is not true of a slot machine.

In pinball games the insertion of the coin merely releases the balls for play. From that point on the play of the game is under the control of the player who, with greater or lesser skill in the application of the proper amount of force, releases the plunger which propels the balls. Thereafter the manual dexterity of the player in slightly tilting or nudging the machine and, in some games, manipulating the "flippers" to again propel the ball, is instrumental in achieving a high score. In none of these games does a favorable result depend only on pulling a lever at the propitious time in the mathematical sequence of plays on the machine. The following features of the pinball games involved here clearly evidence that they are so constructed and designed as to make the operation thereof depend in substantial part upon the skill of the player:

1. The ball guide plate located under the ball shooter or plunger is equipped with either six or seven scored lines in order to provide a means for the player to gauge the intensity of his shots and thereby skillfully start balls down left, right or center portions of the playfield (R. 21, 28, 31, 48, 51, 57).

2. The knob on the ball shooter is designed to afford the player's fingers very little contact surface, thereby assuring the player a maximum amount of sensitivity in gauging his shot (R. 57).

3. A player exercises judgment in determining what numbered hole is required to light up a sequence and in deciding what side of the playing field the ball should be shot to (R. 57).

4. The 35 to 45 posts on the playing field are equipped with rubber rings. These cause the ball to bounce to the

left or right or backwards. This rebound can be increased or cushioned by nudging the machine (R. 58).

5. Nudging is effected by hitting the left, right or front side of the front rail of the game. The legs of the cabinet are so constructed as to allow the whole cabinet to be moved forward, sideward or toward the player to permit nudging (R. 21, 48, 51, 57, 58).

6. The officer of the corporation which manufactures devices competing with those involved in this case (R. 44-6) testified that the major difference between the games in this case and those manufactured by his company was in the amount of skill employed in the operation (R. 46) and that one of the features of his games adding to the necessity of using skill was "flippers" enabling a player to flip the ball back on the playing field (R. 45, 46). One of the games in this case had a "jumbo flipper" which propelled the entire playing field forward (R. 58, 75-6), so that, under the test advanced by the United States' own witness, skill predominated in that particular game and it is clearly an amusement game. The same witness for the United States also readily admitted that skill is involved in the operation of all three of the pinball games here involved (R. 51).

7. There is skill and judgment and playing experience in utilizing and selecting certain phases of the game features available on the back glass and in trying to get certain numbered holes to obtain the highest possible score (Tr. 57, 59, 71).¹⁰ In *People v. One Mechanical Device*, Docket 34029, decided on March 20, 1957, the Illinois Su-

10. Regardless of the extent to which chance may effect changes in the so-called game features, no game is completed until at least five balls have been played. Thus the outcome of every "operation" of the machine, as such term is used in Section 4462(a), is necessarily exposed to exercise by the player of each of the several elements of skill described in detail by respondent's witness (R. 56 ff.).

preme Court said of a game substantially similar to the ones here involved:

"The object of the game, the distribution and position of the holes, and the alternative methods of scoring cause the player to exercise some judgment in the operation of the game."

Webster's New International Dictionary, 2d Edition, 1955, defines "skill" as:

"Understanding; discernment; judgment; also judiciousness.

"The ability to use one's knowledge effectively and readily in execution or performance; technical expertness; proficiency.

"A particular art or science; now usually, a power or habit of doing a particular thing competently; a developed or acquired aptitude or ability; an accomplishment.

"Psychol. (a) smoothness and good coordination in the execution of a learned motor performance; (b) a motor performance that has become facile and well integrated as the result of practice."

Black's Law Dictionary, 3rd Edition, defines "skill" as:

"Practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them in practice in a proper and approved manner and with readiness and dexterity."

A dichotomy between the well-known slot machine where no skill is necessary and the well-known pinball game where skill is needed, is logical and enforceable. Any tax agent can readily distinguish between the two devices and can exact the \$250 tax from slot machines and the \$10 tax from pinball games. But how would the tax be enforced if the tax agent were required to apply mental calipers to determine relative amounts of chance and skill or if a

particular device was construed to be a slot machine on this day (when payouts were made) and a pinball game on that day (when they were not)?

4. A Pinball Game Is Not Transformed Into a Slot Machine by Any Action of Its Owner or Possessor.

The United States contends that the taxability of pinball games is to be determined by the *use* to which they are put. That contention is wholly inconsistent with the clear meaning of the statute.

The separate taxes imposed by Sections 4461-4463 are placed on the coin-operated machines themselves, *not on the use to which the machine may be put*. If two players of a pinball machine decide to gamble on the results of their play, the machine is not thereby converted into a gambling device. A pinball machine cannot be transformed into something else merely by the award of nominal prizes for the attainment of high scores, or the payment of cash in lieu of additional amusement. The machine remains the same. It is still a device whereby one or more balls are propelled through a chute by the operation of a plunger in the hands of the player, with the ball then registering a score by hitting various bumpers or other objects or by dropping into holes and actuating electrically controlled circuits. The redemption of unused free games by the location owner does not transform the machine into one containing a pull lever and insignia on reels or drums. The game of golf also embodies an element of chance and may be made the subject of a wager, but it does not cease to be golf merely because players place nominal bets upon the outcome of a particular game. The pinball machines here involved could not have been converted into slot machines solely by reason of a wager made by two or more players upon their respective abilities to attain a given score. They could not be so converted by anything done or not done by the proprietor.

In *Stoutamire v. Pratt*, 148 Fla. 690, 5 So. 2d 248 (1942), the Florida Supreme Court said at page 250:

"Of course, almost any sort of a mechanical device may be used to determine the result of a wager. The ordinary coin-operated scales may be used for such purpose, thus: Three men may gamble on guessing the weight of a fourth man according to the mechanical coin-operated scales and, when they have each registered his guess, put a penny in the slot, have the fourth man step on the scales and thereby determine the winner. There is practically no limit to the matters which may be made the subject of gambling or wagers."

In *Commonwealth v. Mihalow*, 142 Pa. Super. 433, 16 A. 2d 656 (1940), the game involved was a pinball-type miniature bowling game. On page 659 the court said:

"Many things made for proper and legitimate purposes may be used for gambling, but what may be used as the subject of a bet is not *ipso facto* illegal or a gambling device. A horse race is not a gambling device, nor is a game of golf, nor a game of baseball, nor a game of billards; but betting on them is gambling. To say that this machine does not have any element of chance is to shut our eyes to the obvious; but in many games which are recognized as games of skill there is present some element of chance, and in many games of chance there is often present an element of skill."

If it were possible to convert a pinball game into a "so-called 'slot' machine" through its use, it would be possible to likewise transform any coin-operated amusement game into a slot machine, which not even the Treasury Department has ever contended. The other amusement machines covered by the \$10.00 tax are not converted into slot machines simply by adding the element of a possible prize. For example, the simulated bowling, baseball, football, hockey, and basketball games and the various types of gun games do not become slot machines because a pro-

prietor decides that the attainment of a designated score should entitle the player to a prize. The games continue to be as different in structure from slot machines as they are when the attainment of a designated score entitled the player to additional free games. A letter dated in 1951, written by the Deputy Commissioner of Internal Revenue and read into evidence in this case (R. 90-1), stated in part as follows:

"The coin-operated device 'Gun Patrol' regardless of whether prizes are offered for scoring hits, is considered to be a coin-operated amusement device since the successful operation is attained by the player's skill, as distinguished from the element of chance predominant in slot machines or other similar gaming devices. Accordingly, persons maintaining for use such devices on premises occupied by them incur special tax liability of \$10.00 per year per machine."

Section 4462(a)(2) requires that the machine "may deliver or entitle the person playing" to receive cash or other valuable thing. United States Exhibits 3, 4 and 5 (R. 41) do not show that successful players may receive or be entitled to receive cash or other valuable thing. A pinball machine is not transformed into a slot machine by any action of its owner or possessor.

II.

**IF THE PINBALL GAMES HERE INVOLVED ARE CON-
STRUED TO BE "SO-CALLED 'SLOT' MACHINES" THE
STATUTE IS UNCONSTITUTIONAL AND VOID.**

**A. Such Construction Would Inject Such Vagueness and
Uncertainty Into a Penal Statute as to Constitute De-
nial of Due Process of Law.**

Respondent contends that Sections 4461 to 4463 are clear and unambiguous. The term "slot machine" is given form by its use in common parlance and by definition in the only other Congressional enactment which uses the term. If any ambiguity does exist, the meaning of that term is clearly resolved by the legislative history of the statute and the other criteria for construing statutes. If, however, the terms "so-called 'slot' machine" is construed to embrace devices which are wholly different in structure and operation from the familiar slot machine, then the statute is unconstitutional and void. To so construe the statute would demand "the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." See *United States v. L. Cohen Grocery Co.*, 255 U. S. 81 (1921). The operation of Sections 4461 to 4463 would be so uncertain that enforcement thereof would leave to conjecture the dividing line between that which is lawful and that which is unlawful. Such a construction of the statute would constitute a denial to this respondent of due process of law. *McBoyle v. United States*, 283 U. S. 25, 27 (1931); *United States v. Five Gambling Devices*, 346 U. S. 441, 453 (1953). In *Connally v. General Construction Co.*, 269 U. S. 385, 391 (1926), the Supreme Court said:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will

render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of the process of law."

The machines introduced as United States' Exhibits 3, 4 and 5 were of three varieties, each embodying special features which the others did not possess. A government agent testified that respondent also maintained a coin-operated bowling game and a music machine on the premises (R. 16). Testimony with respect to the alleged redemption of free plays was offered only in connection with the "Variety" and "Gaiety" machines (R. 24, 29). If the ordinary taxpayer cannot reasonably determine which, if any, of these devices are "slot machines", the respondent should not be held criminally responsible for failure to make that determination. Extension of the term "slot machine" to any of the devices involved herein would pervert the language adopted by Congress and would extract the last vestige of certainty and meaning from that term.

B. Such Construction Would Be Arbitrary and Discriminatory and Would Invalidate the Statute.

It is clear that the award of a "free play" without more does not convert an amusement machine into a gaming device. Section 4462(a)(2) refers only to the award of "cash, premiums, merchandise or tokens", and a free play is none of these.

A free play is a condition of the mechanism which permits continued operation without the insertion of an additional coin; it is, in one sense, the mechanical equivalent of that coin. The player who "wins" a free play is entitled

to use that play in lieu of an additional coin, or he may "sell" it to another player or he may abandon his right and thus enable the next player to operate the machine without depositing a coin. In any of these situations, the game apparently remains an "amusement machine". If a player of the pinball machines herein agrees to forego his right of replay in consideration of the payment of ten cents by respondent, he has merely sold a mechanically-delivered privilege, existing after completion of the game's operation, for its true equivalent in cash. This transaction, consisting of the payment of money in exchange for the surrender of a privilege of equal value, does not relate back to the earlier operation of the device itself and convert that device into a gaming machine. Congress did not so intend. But if that is the law, it presents a distinction too arbitrary and unreal to withstand the constitutional tests.

III.

IN ANY EVENT THE RESPONDENT DID NOT WILFULLY FAIL TO PAY THE TAX IMPOSED BY SECTION 4461(2) OF THE INTERNAL REVENUE CODE.

The indictment charges that respondent, in violation of Section 7203 of Title 26, U. S. Code, "wilfully" failed to pay the tax required to be paid by Section 4461(2) of that title. It is agreed that the \$250 tax imposed by that subsection was not paid by respondent prior to the time or times mentioned in the indictment, but that the \$10 tax imposed by subsection (1) of that section was paid by respondent with respect to all periods material hereto (R. 11, 6).

The substantive provisions of the Code relating to coin-operated amusement and gaming machines have been in effect without change (except in 1942) since the enactment of H. R. 5417 in 1941. Yet, so far as counsel for the re-

spondent have been able to determine, this is a case of first impression; during most of the fourteen years since 1941 no attempt was made to prosecute a failure to pay the \$250 tax with respect to pinball devices. Until as recent a date as 1952 the Treasury Department itself treated pinball machines as separate and distinct from slot machines (Resp. Ex. 1 R. 81, 94). As heretofore pointed out, the plain meaning of the statutory language provided ample reason for respondent's belief that his devices were not taxable as slot machines. That belief was further confirmed by the legislative history of the Code provisions and other criteria. Moreover, for reasons heretofore set forth, it cannot be denied that substantial doubts exist as to the validity of any attempt to impose criminal penalties with respect to the devices herein without denying respondent due process of law.

Even if the tax was applicable to these machines, therefore, and even if this decision should not fail for want of due process, it is nevertheless apparent that the United States has failed to prove a wilful violation of the statute.

It has frequently been held that the courts may properly consider, in determining the wilfulness of an offense under the Internal Revenue laws, evidence that a substantial basis existed for a belief that the asserted tax was not in fact payable. See *United States v. Phillips* (7th Cir.), 217 F. 2d 435, and cases cited therein.

In *United States v. Kahriger* (3rd Cir.), 210 F. 2d 565, the defendant was convicted of having "wilfully" failed to register for and to pay the special occupational tax relating to wagering required by Sections 3290 and 3291 of the Internal Revenue Code. It was admitted that defendant had deliberately refused to register and pay the tax, but he had done so in the belief that the statute was unconstitutional in requiring his self-incrimination under Fed-

eral and state laws. The decision of the Supreme Court in an earlier appeal from the same prosecution, *United States v. Kahriger*, 345 U. S. 22 (1953), . . . on the first adjudication by that tribunal of the issue of self-incrimination posed by the statute. The Court of Appeals for the Third Circuit reversed the conviction and remanded with direction to enter judgment of acquittal. "It cannot be said," the court held, "that Kahriger's attitude was unreasonable * * * under the circumstances." The court continued:

"There is nothing in the record, no scintilla of proof, that Kahriger refused the information wilfully, that is to say that he refused to register because of 'bad faith' or 'evil intent'. True his failure to register was 'voluntary', but that is not sufficient. * * * In our opinion the United States has completely failed to meet the burden of proof imposed upon it under the circumstances."

To the same effect, see *United States v. Murdock*, 290 U. S. 389 (1933).

Here, as in the *Kahriger* case, important statutory and constitutional issues are to be resolved for the first time. This respondent is in a far stronger position than Kahriger, however, for the latter could not question that the statute, if valid, was applicable to his activities. Surely it cannot be said that respondent acted in "bad faith" or with "evil intent" or wilfully.

CONCLUSION.

The statutory language and the legislative history of the statute clearly supports the judgment of the Court of Appeals.

For the reasons stated the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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FILED.

JUL 10 1957

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 596. UNITED STATES OF AMERICA,
Petitioner,
vs.
 WALTER KORPAN,
Respondent,

No. 674. UNITED STATES OF AMERICA,
vs.
 JAMES B. HUNT, ET AL.

No. 675. UNITED STATES OF AMERICA,
vs.
 HAROLD A. OLLHOFF.

No. 723. UNITED STATES OF AMERICA,
vs.
 MICHAEL D. MACK.

No. 724. UNITED STATES OF AMERICA,
vs.
 JOSEPH CALL.

No. 725. UNITED STATES OF AMERICA,
vs.
 EARL R. EDWARDS.

No. 726. UNITED STATES OF AMERICA,
vs.
 HOWARD E. HATCH.

No. 727. UNITED STATES OF AMERICA,
vs.
 PETE HARRIS, ET AL.

PETITION FOR REHEARING.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 596.

UNITED STATES OF AMERICA.

Petitioner,

vs.

WALTER KORPAN,

Respondent.

AND OTHERS.

PETITION FOR REHEARING.

In the midst of the great attention presently focused on important civil rights and economic decisions of this Court during the current term, it appears to be a work of supererogation to burden the Court with the pinball games of a small resort owner. Despite this and the notable inefficacy of petitions for rehearing, this petition is not only presented in good faith but with a sense of a duty to point out, respectfully, that the decision of the court violates most of the canons of statutory construction to which this court and its members have professed to adhere.

1. The fact that the case involves "gawbling devices" should not determine the construction of the statute. The possible unpopularity of the subject-matter should not

cause the Court to "search for hints to find a command."¹ "But the judge, if he is worth his salt, must be above the battle. We must assume in him not only personal impartiality but intellectual disinterestedness. In matters of statutory construction also it makes a great deal of difference whether you start with an answer or with a problem."²

2. The opinion reads out of the statute three words—"so-called 'slot'" in Section 4462(a)(2)—since the statute as now interpreted by the Court would have *precisely* the same meaning without them. In fact the arguments now adopted by the Court would have required the legislative draftsmen to eliminate the three words if

"(1) the draftsmen were apprehensive that the term 'slot-machine' might be a slang expression not accepted as proper English or

"(2) they wanted to cover every gambling device operated by the insertion of coins through a slot even though the device might go under a label other than 'slot machine.'"

Both of the apprehensions would have been simply and conveniently avoided by striking out "so-called 'slot'". But the fact is that the words were not stricken by Congress but by the Court. "A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statemanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction * * *. Legislative words presumably have meaning and so we must try to find it."³ " * * *

1. Dissent of Mr. Justice Frankfurter, joined by Mr. Justice Black and Mr. Justice Douglas, *United States v. Turley*, 77 S. Ct. 397 (1957) at 402.

2. Mr. Justice Frankfurter, *Of Law and Men* (1946) at 47.

3. *Ibid.* at 53.

the only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so."⁴

3. The Court should not attribute greater weight to isolated statements in Congressional floor debate than to the contrary expressions in Congressional reports. The Court has ascribed no importance to repeated statements such as that appearing in the House Report and describing the scope of the lower tax category:⁵

"Under this amendment there will be included *in addition to pin-ball machines* a great variety of other machines, such as baseball and football games, machine-gun games, music machines (so-called juke boxes), and many other types of coin-operated games."

Human communication is incapable of clearer expression than that appearing in the Senate and House reports. The Court chose to adopt contrary statements made during floor debate although as recently as during the current term it stated that debate is "not entitled to the same weight as these carefully considered committee reports."⁶ "A painstaking, detailed report by a Senate Committee bearing directly on the immediate question may settle the matter. A loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical."⁷

4. The administrative interpretation relied on by the Court was ignored by the Treasury Department itself for more than twelve years. In a case decided during the current term, this Court said:

4. *Ibid.* at 55.

5. H. R. Rep. No. 2333, 77th Cong., 2d Sess., page 180 (1942).

6. *United States v. International Union*, 77 S. Ct. 529 (1957) at 538.

7. *Op. cit.* n. 2, at 67.

"The Government relies on the fact that a few soldiers who invoked the protection of the 1918 Act and allowed their policies to lapse were later required to reimburse [the Government]. However these collections were so sporadic and so insignificant that instead of supporting the Government's position they contradict it."⁸

5. The opinion of the Court states that "the remainder of § 4462(a)(2), as well as § 4462(c), has language which affirmatively suggests that § 4462(a)(2) was designed to include all sorts of coin-operated gambling devices regardless of their particular structure or the method by which they paid off players." A general "suggestion" in a statute is always deemed subordinate to the specific language—which, in this case clearly limited the higher tax to a "one-armed bandit" or "so-called 'slot' machine." In a case decided in the current term, this Court quoted the following with approval:

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment * * *. Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'"⁹

6. Finally, as a justice of this Court said in another case decided during the current term, "I would not make the penal consequences of an Act turn on a construction so tenuous."¹⁰

7. In any event, since neither this Court nor the Court of Appeals passed upon the question of the wilfulness of

8. *United States v. Plesha*, 77 S. Ct. 275 (1957) at 279.

9. *Clifford F. MacEvoy Co. v. United States*, 322 U. S. 102, 107, quoted in *Fourco Glass Company v. Transmirra Products Corporation*, 77 S. Ct. 787 (1957) at 791-2.

10. Dissent of Mr. Justice Douglas, joined by Mr. Justice Black, *Achilli v. United States*, 77 S. Ct. 995 (1957) at 999.

the respondent Korpan, this case should be remanded to the Court of Appeals for a decision upon that issue.

For the reasons stated, a rehearing of this case by this Court is prayed.

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Attorney for Respondent.